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SUPREME COURT OF OHIO

OCTOBER TERM, 1946

No. 30456

MAX KUT,

vs. *Plaintiff-Appellant,*

ALBERS SUPER MARKETS, INC., B. MANISCHEWITZ CO., BLUE BIRD PIE CO., GEORGE WIEDEMANN BREWING CO., INC.,

AND *Defendants,*

BUREAU OF UNEMPLOYMENT COMPENSATION OF THE STATE OF OHIO, AND BOARD OF REVIEW THEREOF, *Defendants-Appellees.*

JURISDICTIONAL STATEMENT

Max Kut, petitioner herein, submits the following statement disclosing, as required by Rule 12 of the Rules of the Supreme Court of the United States, the basis upon which he contends that Court has jurisdiction on appeal to review the judgment, entered May 1, 1946, of the Supreme Court of Ohio.

1. The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Ohio is Judicial

Code, Sec. 237, as amended (28 U.S.C., Sec. 344(a)), which provides in part:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of . . . a statute of any state, on the ground of its being repugnant to the Constitution • • • of the United States, and a decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal • • •"

2. The statute of the State of Ohio, the constitutional validity of which is involved, is known as the Ohio Unemployment Compensation Act, which was originally enacted in 116 O. L., Part II, pp. 286 to 308, Sections 1345-1 to 36, both inclusive, effective December 17, 1936. The section pertinent to this appeal is General Code of Ohio, Sec. 1345-6, as amended in 120 O. L., pp. 666, 682, effective June 28, 1943, reading:

> "Sec. 1345-6. Each eligible individual shall receive benefits as compensation for loss of remuneration due to total or involuntary partial unemployment in the amounts and subject to the conditions stipulated in this act; • • •
>
> "a. No individual shall be entitled to any benefits unless he or she
>
> • • • • • • •
>
> "(2) has made a claim for benefits in accordance with the provisions of section 1346-4 of the General Code;
>
> • • • • • • •
>
> "(4) is able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted; and
>
> "(5) is unable to obtain work in his usual trade or occupation or any other employment for which he is reasonably fitted including employments not subject to this act.

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"b. An individual suffering total or partial unemployment shall be eligible for benefits for unemployment occurring subsequent to a waiting period of two weeks and no benefits shall be or become payable during this required waiting period, but no more than a total of two weeks of waiting period or periods shall be required of any such individual in any benefit year in order to establish his eligibility for total or partial unemployment benefits under this act; except that:

"An individual who has been discharged for just cause in connection with his work or who has voluntarily quit his work without just cause *in connection with his work* and thereafter is unable to secure other employment, shall have a waiting period of three additional weeks during which no benefits shall be payable.

"The waiting period for total unemployment shall commence on the first day of the first week with respect to which the individual first files a valid claim for benefits at an employment office or other place of registration maintained or designated by the administrator or on the first day of the first week with respect to which he has otherwise filed a valid claim for benefits in accordance with the rules and regulations of the bureau.

• • • • • • •

"c. An individual's maximum • • • benefits • • • *for any benefit* year shall be reduced by six • • • *times his weekly benefit amount* in the event his unemployment results from discharge for just cause in connection with his work or from voluntarily quitting his work without just cause in connection with such work • • •;

"d. Notwithstanding the provisions of subsection (a) of this section, no individual may serve a waiting period or be paid benefits for the duration of any period of unemployment with respect to which the administrator finds that such individual:

• • • • • • •

"(2) has refused to accept an offer of work for which he is reasonably fitted;

• • • • • • •

"e. No individual otherwise qualified to receive benefits shall lose the right to benefits by reason of a refusal to accept new work if:

"(1) As a condition of being so employed, he would be required to join a company union, or to resign from or refrain from joining any bona fide labor organization, or would be denied the right to retain membership in and observe the lawful rules of any such organization; or

"(2) The position offered is vacant due directly to a strike, lockout, or other labor dispute; or

"(3) The work is at unreasonable distance from his residence, having regard to the character of the work he has been accustomed to do, and travel to the place of work involves expenses substantially greater than that required for his former work, unless the expense be provided for; or

"(4) The remuneration, hours, or other conditions of the work offered are substantially less favorable than those prevailing for similar work in the locality."

The section above quoted was in force and effect during the period of petitioner's unemployment, March 7, 1944, to April 4, 1944.

3. The judgment of the Supreme Court of Ohio sought to be reversed on this appeal was entered May 1, 1946, and application for appeal was presented to the Chief Justice of the Supreme Court of Ohio on June 13th, 1946, and allowed on said date.

4. Petitioner filed an application with the Bureau of Unemployment Compensation of the State of Ohio for unemployment benefits during the period of his unemployment

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from March 7, 1944, to April 4, 1944. He should have been entitled to one week's compensation after allowing two weeks waiting time without compensation. G. C., Sec. 1345-6-b. His application was disallowed by the administrator

> "for the reason that claimant was not available for work at the hime he filed his application for benefits."

(Board of Review decision, first par.) The "Notice of Ineligibility" gave the reason thus:

> "Facts available establish that the claimant is not available for work on a Saturday. He is therefore not available for work within the meaning of Section 1345-6-a-(4), General Code and Paragraph 412 of the Rules and Regulations.'

5. On or about April 1, 1944, Kut filed an appeal to the Board of Review of the Ohio Bureau of Unemployment Compensation.

Notice of this appeal was given not only to the Bureau of Unemployment Compensation of the State of Ohio and the Board of Review thereof, appellees herein, but to Kut's employers during the base period involved, Albers Super Markets, Inc., B. Manischewitz Co., Blue Bird Pie Co., and George Wiedemann Brewing Co., Inc., as is required to be given to an "interested party" under G. C., Sec. 1345-1-g. At the hearing before the referee, Albers Super Markets, Inc. was represented by its superintendent and personnel director, but took no attitude in the hearing. The base period employer, B. Manischewitz Co., was represented at the hearing but offered no testimony. All other interested parties, although duly notified as to the date, time and place of said hearing, failed to appear. (See decision, Board of Review, third paragraph). The referee who heard the appeal affirmed the decision of the administrator disal-

lowing the claim. The reason given related solely to "availability" under Section 1345-6-a-(4) and Regulation 412. The referee said:

> "The holding of the Administrator to the effect that the claimant is ineligible for benefits because of his unavailability from sundown Friday to sundown Saturday, which is in the normal working week, does not interfere with his right to hold religious beliefs of his choice nor does it affect or diminish his civil capacity • • •
>
> "For the above reasons, it is held that claimant has so restricted the terms of his employment at the time he filed his application for benefits that he could not be considered fully available for work and his claim is disallowed."

6. Kut then appealed to the Board of Review from the decision of the referee on grounds that included:

> "1. Section 1345-6-a(4) of the General Code of Ohio does not require any individual, otherwise entitled to any benefits under the Ohio Unemployment Compensation Act, to be available for work seven days a week, including such individual's religious Sabbath.
>
> "2. If Regulation 412 of the Bureau of Unemployment Compensation is interpreted to require an individual, otherwise entitled to benefits under the Act, to be available every day in the week, including such religious Sabbath, such Regulation is not authorized by Section 1345-6-a(4) of the General Code of Ohio, or by any other section of the Ohio Unemployment Compensation Act.
>
> "3. If the aforementioned Regulation 412 be deemed to be authorized by Section 1345-6-a(4) of the General Code of Ohio, then said Regulation and said Section are contrary to the First and Fourteenth Amendments to the Constitution of the United States and to Article VIII, Section 3 of the Constitution of Ohio.

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"4. Although the Referee in his decision rules that the First Amendment to the Constitution of the United States is exclusively a restriction upon Federal power and is not a limitation upon the State, there are numerous decisions of the Supreme Court of the United States holding that the Fourteenth Amendment of the Constitution of the United States, which is a limitation upon the States, includes, as a part of such limitation upon state power, any legislation interfering with freedom of religion or discriminating on account thereof. See *Cantwell* v. *Commission*, 310 U. S. 296, 303, approved *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116. See, also, *Schneider* v. *State*, 308 U. S. 147; Board *of Education v. Barnette*, 319 U. S. 624, 637."

adding:

"WHEREFORE, appellant prays that the decision of the administrator, dated March 24, 1944, which disallowed appellant's claim on the sole ground of alleged non-availability, and the decision of the Referee, dated May 4, 1944, affirming said decision, be reversed and set aside and that appellant be held to be entitled to benefits under the Ohio Unemployment Compensation Act."

The "Notice of Hearing on Appeal from the Decision of the Referee" issued by the secretary of the Board of Review of the Bureau of Unemployment Compensation recites that the following issues have been raised by said appeal: "availability." None of Kut's aforementioned employers took any part in the appeal to the Board of Review. The majority decision of the Board of Review affirmed the referee's report. Under the head, "Reason," it defined

"Issues: (1) availability; (2) unable to obtain work." and concluded:

"We, therefore, find that claimant was not available for work in his usual trade or occupation and was not

> unable to obtain work for which he was reasonably fitted at the time of filing his application for benefits. Accordingly, his application must be disallowed and benefits denied."

One of the three members of the Board of Review filed a dissenting opinion

> "dissenting from the decision of the majority because of the construction given to the term 'availability'."

It was the view of the dissenting opinion that G. C., Sec. 1345-6-a(4) and Rule 412 adopted under it should have been read in connection with G. C., Sections 13044 and 13045, quoted in the opinion, which prohibit labor on Sunday excepting as to work of necessity or charity and not extending to

> "persons who conscientiously observe the seventh day of the week as the sabbath and abstain thereon from doing things prohibited on Sunday."

(As will be shown, the Ohio Supreme Court interpreted G. C., Sec. 1345-6-a(4) as meaning that an individual would not be entitled to benefits if he was not available, because of religious belief, for work on Saturday, his Sabbath.) The majority and dissenting opinions of the Board of Review appear in the appendix to this statement.

7. Kut then appealed to the Common Pleas Court of Hamilton County, Ohio, as authorized by G. C., Sec. 1346-4, having made his aforementioned employers during the base period involved appellees in addition to the Bureau of Unemployment Compensation and the Board of Review thereof. In his notice of appeal, he gave nine assignments of error, the first three of which are the same as above quoted in the appeal to the Board of Review from the deci-

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sion of the referee. These assignments also included the following:

> "Prior to March 7, 1944, and since April 4, 1944, appellant has obtained employment which did not require him to work on his Sabbath and there are numerous jobs available which do not require work on said Sabbath."

The Common Pleas Court on November 15, 1944, filed an opinion of which a verbatim copy appears in the appendix to this statement. Following this opinion, the Common Pleas Court entered a judgment of reversal, a copy of which appears in the said appendix, p. 48.

8. The Board of Review perfected an appeal to the Court of Appeals on questions of law, under G. C., Sec. 12223-2 (substantially the equivalent of the former petition in error).

The opinion of the Common Pleas Court shows that because of certain union rules pertaining to seniority prohibiting the promotion and advance in salary which Kut had been given

> "Rather than demote the appellant, the employer gave him a release. His employment was thus terminated."

The judgment entry of the Common Pleas Court included in its findings:

> "3. That appellant voluntarily quit his work at Albers Super Markets, Inc., on March 7, 1944, for just cause * * *"

Kut's employers in the base period did not appeal from the judgment of the Common Pleas Court, took no further part in any of the subsequent proceedings and are now only nominal parties on this appeal.

The Attorney General of Ohio, in connection with the appeal to the Court of Appeals, assigned as error:

"1

That the Common Pleas Court erred in holding that the decision of the Board of Review denying Max Kut's claim for benefits was unreasonable and contrary to the constitution and law of Ohio.

2

That the Common Pleas Court erred in reversing the decision of the Board of Review."

It will be noted there was no assignment of error questioning the finding in the opinion and judgment of the Common Pleas Court that Kut's employer gave Kut his release and that he quit work "for just cause". There was no assignment of error that this finding was not sustained by the evidence or was against the weight of the evidence.

By G. C., Sec. 12223-21:

"(1) Appeals taken on questions of law shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant before hearing. • • • All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the error or errors found in the record upon which the judgment of reversal is founded."

The Court of Appeals reversed the judgment of the Common Pleas Court and in an opinion (copy of which appears in the appendix to this statement) denied Kut compensation. It will be observed from the very end of the opinion that the judges concur in the syllabus, opinion and judgment. The syllabus shows that Kut was denied compensation because he refused, on the ground of conscientious

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scruples, employment requiring work on Saturday. The opinion shows that as the employer would have had to demote Kut both as to character of work and pay and

> "the employer assumed that this would not be satisfactory to Kut and gave him his release, thus terminating his employment on March 7, 1944."

The judgment entry of reversal of the Court of Appeals is set out in the said appendix, p. 48. Kut requested the court to specify in writing the grounds of reversal (G. C. Sec. 12223-39). The Court of Appeals, in its entry, in finding no constitutional rights of Kut under the Constitution of Ohio or the Constitution of the United States had been infringed and that there was prejudicial error in the judgment of the Common Pleas Court reversing the decision of the Board of Review, complied with this request and confirmed the sole basis of decision against Kut, namely, that because he would not work on his religious Sabbath, Section 1345-6-a(4) rendered him ineligible for unemployment compensation benefits and that Section 1345-6-a(4) thus construed does not violate either the federal or state constitutions.

9. Kut filed his notice of appeal on questions of law, both:

(a) as of right under Article IV, Section 2 of the Constitution of Ohio, giving the Supreme Court

> "appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state. * * *"

and (b) on petition that motion to certify be allowed by that court under that portion of Article IV, Section 2, providing

> "in cases of public or great general interest the supreme court may * * * direct any court of appeals to certify its record to the supreme court and

may review, and affirm, modify or reverse the judgment of the court of appeals."

According to Rule X of the Rules of the Supreme Court of Ohio (with amendments to November 12, 1945) (Cumulative Supplement for Volume 9, Page's Ohio General Code Annotated, p. 47):

"Section 1. All claims for or against the jurisdiction of the Court shall be submitted by counsel for the respective parties at the time of hearing a motion to certify or for leave to *appeal*. If appellant claims constitutional questions are involved he is requested to file his *appeal* as of right at the time of filing a motion to certify the record.

"Section 2. Where both motion to certify the record and *appeal* as of right are filed the motion to certify and motion to dismiss such *appeal* as of right will be heard together, the *appellant* taking the affirmative and *appellee* the negative upon the question of jurisdiction. No further presentation of oral argument upon said question will be allowed.

"Section 3. Where both the motion to certify the record and the *appeal* as of right upon claimed constitutional question are filed, but no motion to dismiss the *appeal as of right* has been filed, the Court will sua sponte hear the case as on motion to dismiss *such appeal.*"

By Sec. 12223-21a, assignments of error may also be filed on behalf of an appellee. Rule II, Section 1(C) of the amended rules of the Supreme Court of Ohio provides for notices of cross appeal and requires that a party filing a cross appeal shall be required to comply with all rules applicable to an appellant. The Attorney General took no cross appeal to review the findings of the lower courts that Kut had been given his release by his employer and that he quit "for just cause". By G. C., Sec. 12223-31:

"the Supreme Court shall not be required to determine as to the weight of the evidence."

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The Attorney General did not question the findings of the Court of Appeals in his brief on motion to dismiss the appeal as of right and to overrule the motion to certify or, after his motion to dismiss the appeal as of right had been overruled and the motion to certify had been granted, in his brief on the merits. Indeed, the first and third paragraphs of the former brief are:

> "The facts are simple and are not contradicted. The gist is that Kut refused to accept two offers of jobs for the sole reason he would not work on his Jewish Sabbath (sundown Friday evening to sundown Saturday evening). Saturday is one of the customary and usual workdays in these United States of America.
>
> "Kut refused to accept a job referral as required by law and therefore his right to benefits was denied."

These are also the identical first and third paragraphs of the brief of the Bureau and Board on the merits. On page 12 of this brief appears:

> "The sole question then is whether he had a right to refuse the offer of work on the ground that he would not work on Saturdays because of his religion."

Kut's assignment of errors asserts that the Court of Appeals erred in each of the following respects:

> "1. In ordering that the judgment of the Court of Common Please be reversed.
>
> "2. In affirming the decision rendered by the majority of the Board of Review of the Bureau of Unemployment Compensation.
>
> "3. In finding that no constitutional rights of Max Kut, plaintiff-appellant, under the Constitution of Ohio or under the Constitution of the United States have been infringed by the Bureau of Unemployment Compensation of the State of Ohio and the Board of Review thereof.
>
> "4. In finding prejudicial error in the judgment of the Court of Common Please of Hamilton County, Ohio

reversing the decision of the majority of said Board of Review.

"5. In finding that an employee may not claim unemployment compensation where, because of conscientious religious scruples, he refuses to take employment requiring work on Saturday.

"6. In finding that Regulation 412 of the Bureau of Unemployment Compensation is a reasonable regulation and in finding that such regulation is authorized by the Ohio Unemployment Compensation Act.

"7. In holding that Section 1345-6a (4) of the General Code of Ohio requires an individual, otherwise entitled to benefits under the Ohio Unemployment Compensation Act, to be available for work seven days a week, including such individual's religious Sabbath.

"8. In failing to find that the decision of the Board of Review, denying unemployment benefits to plaintiff-appellant solely on the ground that he is not available for work on his religious Sabbath, does not constitute an interference with freedom of religion and a discrimination on account thereof, in violation of the Fourteenth Amendment to the Constitution of the United States and Section 7 of Article I of the Constitution of Ohio.

"9. In failing to find that the denial of unemployment benefits to plaintiff-appellant solely on the ground that he is not available for work on his Sabbath is an express violation of Article I, Section 7, of the Ohio Constitution that no preference shall be given by law to any religious society or mode of worship.

"10. In failing to find that the decision of the Board of Review is contrary to the Constitution and general policy of the General Assembly of Ohio to give all elements of the population an opportunity to have some period which they can observe as their Sabbath, without discrimination against them for observing that period.

"11. In failing to find that the performance by Kut of gainful labor on his traditional Sabbath would not be work in his 'usual trade or occupation' or work for which he is 'reasonably fitted'.

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"12. In failing to find that Regulation 412 of the Bureau of Unemployment Compensation operates to apply the taxing power of the State for the benefit only of adherents of certain religions.

"13. Other errors apparent on the record."

The opinion of the Supreme Court of Ohio, reported in 146 O. S. 522, and its order of affirmance appear in the appendix to this statement. The per curiam opinion states (p. 522):

"The application was disallowed by the administrator on the following ground:

" 'Facts available establish that the claimant is not available for work on a Saturday. He is therefore not available for work within the meaning of Section 1345-6a (4), General Code, and Par. 412 of the Rules and Regulations.' "

At p. 524, the court gives the substance of the contention made by Kut:

"(1) that under the above-quoted provision of the statute he may not be required to be available for work on Saturday, and (2) that if this provision is so construed it is violative of Section 7 of Article I of the Constitution of Ohio and Section 1 of the Fourteenth Amendment to the Constitution of the United States."

and finds (id.):

"• • • the statute is not unconstitutional."

However, aside from the constitutional aspect, the court also included in its opinion (p. 523) as to his employment with Albers Super Markets, Inc.:

"That employment was terminated by the refusal of the plaintiff to continue to perform the work assigned to him."

and at p. 525, bot. 526, indicates as "a further difficulty" that because Kut refused his original position he violated the statute which was not designed for protection against voluntary unemployment.

Two of the judges concurred in the judgment on the sole ground (p. 526):

> "that when appellant refused the offer of the company to restore him to his original position as an order clerk and quit his job he thereby forfeited his right to unemployment compensation."

There is no basis in the record for the court deciding the case on this non-federal ground. It was stipulated by counsel for Kut and for the Bureau and Board that the opinions and judgments of the Common Pleas Court and of the Court of Appeals correctly and sufficiently present the facts necessary to be considered by the Court. This stipulation is set out in the appendix.

We have already stated that Kut was not required to accept a demotion, that he was given his release by the employer and that he quit for just cause. Even if there had been no finding of both courts below contrary to what the Ohio Supreme Court assumed, namely, that Kut's severance of employment with Albers was without good cause, and even if, contrary to the facts, the Attorney General had assigned as error the weight or sufficiency of the evidence on the issue of quitting for just cause, there are no facts which sustain the assumption of unlawful quitting declared by the Supreme Court as a secondary basis for its opinion.

If Kut had quit his employment without just cause, there would have been no constitutional question arising from his refusal to take employment requiring him to work on his Sabbath. The case would not have been one either of public or great general interest justifying the granting of the motion to certify and there would have been no consti-

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tutional question involved, so that the motion to dismiss the appeal as of right would have been sustained in the usual form used by the court for such cases, e.g., see 146 O. S. 558:

> "It is ordered and adjudged that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved. *Appeal dismissed.*"

But actually the entry of the Supreme Court contained in its mandate is:

> "This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein."

10. The Fourteenth Amendment of the Constitution of the United States includes, as a part of its limitation upon state power, any legislation interfering with freedom of religion or discrimination on account thereof. *Follett* v. *Town of McCormick*, 321 U. S. 573; *Douglas* v. *Jeanette*, 319 U. S. 157; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303, approved, *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116. See, also, *Schneider* v. *State*, 308 U. S. 147; *Board of Education* v. *Barnette*, 319 U. S. 624, 637.

The Court of Appeals for the First Appellate District of Ohio and the Supreme Court of Ohio held that petitioner was free to abstain from work on Saturday but that under Section 1345-6a(4) of the General Code of Ohio the loss of employment benefits, as a result of his religious observance of his Sabbath, did not constitute an unconstitutional interference or discrimination. While employed by Albers Super Markets, Inc., Kut had arranged to be off on his Sabbath

and in lieu thereof worked Sunday afternoon and evening. In all of his prior employments Kut had never worked on his traditional Sabbath but was available for work at all other times of the week, both day and night (See paragraph 3 of Memorandum Opinion of the Common Pleas Court, appended hereto. See also paragraphs 3 and 4 of opinion of the Court of Appeals appended hereto).

Petitioner's employers are required to pay a percentage of Kut's compensation into the state fund. (General Code, Sec. 1345-4.) In *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, the Supreme Court of the United States pointed out that the Unemployment Compensation Act of Alabama, which is like Ohio's, is an exercise of the state's taxing power and its validity is determinable upon "constitutional principles applicable to state taxation". Under the decision of the Supreme Court of Ohio, Max Kut and all others similarly situated, such, for example, as Seventh Day Adventists, can never become entitled to the benefits of the Ohio Unemployment Compensation Act.

The only way petitioner is free to observe Saturday as his day of rest (incidentally, a procedure sanctioned by the Ohio statutes, Sections 13044 and 13045 of the General Code of Ohio) is by foregoing all rights to unemployment benefits, notwithstanding his employers, who are required by the taxing power to pay into the fund for such benefits, had employed him knowing that he was unavailable for work on his religious Sabbath. In practical operation, this would constitute a tax levied for the benefit of the adherents of certain religions exclusively.

In *Minersville District* v. *Gobitis*, 310 U. S. 586, two children of a family affiliated with Jehovah's Witnesses were expelled from public school because of their refusal to salute the flag. Thus, they were denied a free education, and their parents had to put them into private schools. To

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be relieved of the financial burden thereby entailed, their father brought suit. The Supreme Court of the United States, Mr. Justice Stone dissenting, upheld, however, a flag saluting requirement as a condition to the right to attend free public school. Three years later this court reversed itself and renounced the doctrine of the *Gobitis* decision in *Board of Education* v. *Barnette*, 319 U. S. 624. The placing of an economic burden on the exercise of a privilege granted by the Bill of Rights was further denounced by Mr. Justice Douglas in the majority opinion in *Murdock* v. *Pennsylvania*, 319 U. S. 105, as follows:

> "A state may not impose a charge for the enjoyment of a right granted by the federal constitution."

In the case at bar, petitioner may enjoy his religious right of not working on his Sabbath only by necessarily foregoing an economic right in the form of unemployment compensation benefits.

There has been no adjudication by any other court, so far as we know, of the question involved here, namely, whether a statute may constitutionally deny to an individual unemployment benefits solely because he is not available for work on his religious day of rest. The decisions of State Unemployment Commissions on this point are conflicting, as are the decisions of the administrative tribunals and courts that have passed upon petitioner's rights in this case. Many thousands of Orthodox Jews, Seventh Day Adventists and others interested in religious freedom must be concerned over the prospect that the decision of the Supreme Court of Ohio, interpreting a statute similar to statutes in effect in many other states, if permitted to stand, will hereafter deprive employees of rights to respect their faith and yet in proper cases to receive unemployment benefits. That the case is one of great public and general in-

terest is evidenced by the allowance by the Supreme Court of Ohio of petitioner's motion to certify. That the case involves substantial constitutional questions is evidenced by the fact that each of the administrative agencies and Courts that has passed upon this case has concerned itself with the constitutional question involved.

The Supreme Court of Ohio, after deciding that under its interpretation of General Code, Sec. 1345-6-a(4), no rights of petitioner under either the Constitution of the United States or the Constitution of Ohio had been impaired, then sought further to support its decision on the ground that petitioner had voluntarily quit his employment "thus making himself unavailable for work—a direct violation of the statute which was not designed for the purpose of protection against unemployment that is voluntary." (146 O. S. 522, 526).

As already shown, this non-federal ground of the decision of the Supreme Court of Ohio has no support in the record; indeed, it is directly contrary to the undisputed facts in the record as above set forth in paragraph 9 of this statement.

It was stipulated by counsel for petitioner and defendants-appellees that the opinions and judgments of the Common Pleas Court of Hamilton County, Ohio, and of the Court of Appeals for the First Appellate District of Ohio *correctly present the facts.* Indeed, the Common Pleas Court expressly found in its judgment entry that petitioner "voluntarily quit his work at Albers Super Markets, Inc., on March 7, 1944 for just cause and did not secure other employment until April 4, 1944" (Finding No. 3, Judgment Entry of Common Pleas Court, appendix of this statement). General Code of Ohio, Sec. 1345-6, above set forth in paragraph 2 hereof, provides that individuals "who have voluntarily quit their work without just cause, and

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thereafter are unable to secure other work, shall have a waiting period of five weeks during which no benefits may be payable." If an individual quits his work for just cause, as was the case with Kut, the waiting period was two weeks.

In the opinions of both the Common Pleas Court and the Court of Appeals, the Courts found that petitioner's employer had assumed that a demotion, after a promotion at higher pay had been promised, would not be satisfactory to petitioner and gave him his release and thus terminated his employment. Moreover, it was not contended by defendants-appellees in any of their pleadings, assignments of error, briefs or oral argument before the Supreme Court of Ohio or any of the lower tribunals that petitioner had forfeited his right to unemployment compensation on the ground that he had voluntarily quit without just cause.

A review by the Supreme Court of the United States of the constitutional issue involved in a proceeding cannot be prevented by the highest court basing its decision in part on a non-federal ground that is unsubstantial and illusory. *Lawrence* v. *State Tax Commission of Mississippi*, 286 U. S. 276. This Court will review the findings of fact by a state court where a federal right has been denied as a result of a finding without evidence to support it. *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123; *Ashcraft* v. *Tennessee*, 322 U. S. 143.

If this appeal be deemed an improper mode of invoking a review by the Supreme Court of the United States then, in accordance with Section 237 of the Judicial Code, as amended (28 U. S. C., Sec. 344(c)), we request the papers whereon the appeal was allowed to be regarded and acted upon as a petition for certiorari. The special and important reasons for granting a review of the decision and judgment of the Supreme Court of Ohio on appeal are

equally applicable on certiorari and have already been set forth in this statement.

Respectfully submitted,

MURRAY SEASONGOOD,
LESTER A. JAFFE,
Counsel for Petitioner.

PAXTON & SEASONGOOD,
Of Counsel.

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APPENDIX

Appeals Docket No. 20446. 569-REF-44. 247-BR-44

STATE OF OHIO

BOARD OF REVIEW

BUREAU OF UNEMPLOYMENT COMPENSATION

DECISION

In re Claim of:

MAX KUT
3635 Reading Road
Cincinnati, Ohio

SS: 272-20-4362

Claimant made application for unemployment benefits on March 16, 1944, with respect to the week beginning March 5, 1944. The initial determination of the Administrator, dated March 24, 1944, disallowed the claim for the reason that claimant was not available for work at the time he filed his application for benefits.

On April 5, 1944, claimant appealed to the Board of Review. A hearing thereon was held by a Referee April 17, 1944, and his decision, dated May 4, 1944, affirmed the initial determination of the Administrator and disallowed the claim.

On May 9, 1944, claimant made application for permission to institute a further appeal before the Board of Review. His application was allowed and the appeal was heard for and on behalf of the Board of Review June 21, 1944, in the Hearing Room of the Bureau of Unemployment Compensation, Elm Street and Central Parkway, Cincinnati, Ohio. Claimant was represented by Lester A. Jaffe, Esquire, of the firm of Paxton and Seasongood, Attorneys-at-Law. Albers Super Markets, Inc., was represented by Mr. Arno McGowan, its Personnel Director. All other interested parties failed to appear or be represented although they were duly notified as to the date, place and time of the hearing.

FINDINGS OF FACT

Claimant was employed by the Albers Super Markets, Inc., June 21, 1943, as an order clerk. He continued in this capacity until about November 15, 1943, at which time he was assigned to duties as a checker. Early in March, 1944, the Union objected to claimant being promoted in advance of other employees who had acquired more seniority. Employer was therefore required to relieve claimant of his duties as a checker and offered to transfer him to his former work as an order clerk, but claimant refused to return to this work. His employment terminated March 7, 1944.

Claimant is an Orthodox Jew and according to the traditional tenets of his religious faith, he is precluded from working from Friday evening until forty minutes after sundown Saturday, as this period constitutes his religious Sabbath. While employed by Albers Super Markets, Inc., claimant had arranged to be off each Saturday, but in lieu thereof, worked Sunday afternoon and evening.

On March 9, 1944, claimant was given a referral to the H. J. Heinz Company as a shipping clerk at the rate of $0.70 per hour. Claimant was not employed for the reason that he refused to accept any work which would require him to work on Saturday. He testified that he was available for day or night work on the other days of the week, but would not accept any work that would interfere with his observance of his religious Sabbath. The work offered to claimant was work for which he was reasonably fitted by training and experience and the rate of pay offered was not below the prevailing wage for similar work in the locality.

REASON:

Issues: (1) availability; (2) unable to obtain work.

(1) The facts in this case are not in dispute. It is conceded that claimant is not available for work from sundown Friday to sundown Saturday of each week. We must, therefore, determine whether or not an individual whose availability is thus restricted and who is otherwise qualified is entitled to receive unemployment benefits.

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Section 1345-6-a enumerates several qualifying provisions which must be met by each individual before they are entitled to receive unemployment benefits. Subsection a(4) thereof provides:

> "a. No individual shall be entitled to any benefits unless he or she
>
> "(4) is able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted; and * * *"

The term "available" as used in subsection (4) is not specifically defined in the unemployment compensation act. However, pursuant to the authority provided in Section 1345-13(a) (1), the Administrator, with the approval of the Board of Review, adopted regulation 412 to assist him in determining the availability of various claimants. Regulation 412 provides as follows:

> "412.—Total disqualification. An individual may not receive credit for waiting period week or benefits for any week in which he was not physically or mentally able to work, or in which he was not available for work. This means that he must be available each day of such week."

In view of the fact that claimant admits that he was not available for work from 4:00 o'clock p.m. Friday until sundown Saturday of each week, it is apparent that he was not "available for work" within the provisions of said regulation. Claimant contends, however, that said regulation goes beyond and is contrary to the express provisions of the unemployment compensation act.

To determine the validity of said regulation and to properly construe Section 1345-6-a(4), it is necessary to consider the act in its entirety for the purpose of determining the legislative intent and particular reference should be made to the provisions relating to the payment of benefits. It will be noted that unemployment benefits are paid only on the basis of a week of total unemployment or a week of involuntary partial unemployment (Section 1345-8(b) and

(c)). "Week" is defined as the calendar week ending at Saturday midnight unless an equivalent of seven consecutive calendar days is prescribed by the Administrator (Section 1345-1-m). It necessarily follows that to qualify for a week of unemployment benefits, an individual must meet the qualifying provisions for an entire week. Any period of less than a week is not recognized.

Generally, to be available for work within the meaning of subsection (4), an individual must be ready, willing and able to accept work in his usual trade and occupation on the days and during the hours such work is performed. Thus, the standards by which the availability of a particular individual is determined, depend to a large extent upon the type and character of work he is qualified to do. For example, at the present time, most industries engaged in the production of war materials are working three shifts a day. Individuals qualified to do this work must be available for work on any shift where a vacancy occurs. Some businesses customarily operate every day of the week,—notably drug stores, and individuals reasonably fitted for such work must be available for it on the days and during the hours that it is customarily performed.

Coming now to a determination of claimant's availability, we find that he was most recently employed as an order clerk for the Albers Super Markets, Inc. These stores normally work six days a week, Monday through Saturday, with occasional work on Sunday. Applying the principles just discussed to the facts in this case, it is apparent that claimant is not fully available for work in his usual trade or occupation as an order clerk. He would not accept any employment which would require him to work from 4:00 p.m. on Friday until Saturday evening. Not only was he unavailable for Saturday work, but in all probability he would not work a full day-time shift on Friday if the shift extended beyond 4:00 p.m. nor the late shifts Friday evening. At best, claimant was only available for such work as he could obtain by making special arrangements with his employer as he was able to do with the Albers Super Markets, Inc. The record discloses that he had several opportunities to obtain employment in his usual

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trade and occupation which did not ripen into employment, solely because of the limitations placed by claimant upon his availability.

It is contended, however, that an individual should not be required to work on his Sabbath despite the fact that work is customarily done on this day in his usual trade and occupation. We are unable to agree with this contention. The paramount purpose of the unemployment compensation act is to provide individuals suffering unemployment with a portion of the wages they would normally earn while they remain unemployed and are unable to obtain work in their usual trade or occupation or other work for which they are reasonably fitted. Claimant's unemployment was not due to lack of work in his usual trade or occupation, but was due to his unwillingness to accept work that required him to work on Saturday because it would conflict with his religious beliefs. Every individual has the constitutional right to worship according to the dictates of his conscience. However, if, in exercising this right he thereby limits his availability for work and thus prevents his qualifying for unemployment benefits, we are without authority to make an exception because of these circumstances.

We are not at liberty to bend and shape the unemployment compensation law to meet the exceptional cases that may arise in connection with a claim for benefits. As we see it, we are required to construe and apply the law uniformly as to all claimants regardless of their religious beliefs or other personal limitations. Applying the principles above discussed to the facts and circumstances of this case, we find that claimant was not available for work in his usual trade or occupation within the meaning of Section 1345-6-a(4) of the General Code.

(2) Section 1345-6-a(5) provides as follows:

> "a. No individual shall be entitled to any benefits unless he or she
>
> "(5) is unable to obtain work in his usual trade or occupation or any other employment for which he is reasonably fitted including employments not subject to this act."

The record discloses that claimant was offered work on several occasions in his usual trade and occupation which he refused to accept because he would not accept work on Saturday. Clearly he cannot meet the provisions of this subsection unless he was justified in refusing to accept the offers of work by virtue of the provisions of Section 1345-6-e, which provide as follows:

> "e. No individual otherwise qualified to receive benefits shall lose the right to benefits by reason of a refusal to accept new work if:
>
> "(1) As a condition of being so employed, he would be required to join a company union, or to resign from or refrain from joining any bona fide labor organization, or would be denied the right to retain membership in and observe the lawful rules of any such organization; or
>
> "(2) The position offered is vacant due directly to a strike, lockout, or other labor dispute; or
>
> "(3) The work is at unreasonable distance from his residence, having regard to the character of the work he has been accustomed to do, and travel to the place of work involves expenses substantially greater than that required for his former work, unless the expense be provided for; or
>
> "(4) The remuneration, hours, or other conditions of the work offered are substantially less favorable than those prevailing for similar work in the locality."

An examination of this section fails to disclose that an individual would be justified in refusing an offer of work for the sole reason that to accept such work he would be required to work on Saturday contrary to his religious beliefs. Many states in defining "suitable work" consider such factors as health, morals and hazards. The Ohio Law, however, does not contain the word "suitable", and the Ohio Courts have held that it is improper to supply it. The only matter for determination is whether or not the individual is reasonably fitted for the work offered to him. If he is, he will not be justified in refusing it unless some of the conditions or circumstances enumerated in subsection

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"e" are present and none are present in this case. If it had been the intention of the legislature to justify an individual to refuse an offer of work because of his religious beliefs, it seems to us that appropriate language would have been used to accomplish this purpose. In the absence of such language, we are not justified in reading into the law that which is not specifically provided, for, to do so, would be an invasion of the exclusive field of the legislature.

We, therefore, find that claimant was not available for work in his usual trade or occupation and was not unable to obtain work for which he was reasonably fitted at the time of filing his application for benefits. Accordingly, his application must be disallowed and benefits denied.

DECISION:

The decision of the Referee, dated May 4, 1944, is hereby affirmed and the application of claimant for unemployment benefits, dated March 16, 1944, is disallowed and benefits denied.

BOARD OF REVIEW
(Signed) HERMAN R. MILLER,
Chairman.
(Signed) DON W. WIPER,
Member.

Date of Mailing: September 25, 1944.

Attest:
(Signed) AMOS I. GARRISON,
Secretary.

W. T. Roberts, Member, dissents from the foregoing opinion and decision, and files herewith his dissenting opinion.

JBB-7-7.

DISSENTING OPINION OF W. T. ROBERTS, MEMBER

I am dissenting from the decision of the majority because of the construction given to the term "availability". Any rule, regulation or construction which holds without more that a worker, in order to be available for unemployment

benefits, must be available for work seven days in the week does violence to Sections 13044 and 13045 of the General Code of Ohio.

Section 13044 of the General Code of Ohio provides as follows:

> "13044. Laboring or requiring employe to labor on Sunday.—Whoever, being over fourteen years of age, engages in common labor or opens or causes to be opened a building or place for transaction of business, or requires a person in his employ or under his control to engage in common labor on Sunday, on complaint made within ten days thereafter, shall be fined twenty-five dollars, and for each subsequent offense, shall be fined not less than fifty dollars nor more than one hundred dollars and imprisoned not less than five days nor more than thirty days. (R. S. 7033.)"

Section 13045 of the General Code of Ohio provides as follows:

> "13045. Exceptions.—The next preceding section shall not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things herein prohibited on Sunday. (R. S. 7033.)"

The availability paragraph of Section 1345-6-a(4) of the Ohio General Code provides as follows:

> "a. No individual shall be entitled to any benefits unless he or she
>
> "(4) is able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted;"

Regulation 412 of the Rules and Regulations of the Bureau provides as follows:

> "412.—Total disqualification. An individual may not receive credit for waiting period week or benefits for any week in which he was not physically or men-

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tally able to work, or in which he was not available for work. This means that he must be available each day of such week."

The courts on many occasions have held that Sections 13044 and 13045 (R. S. 7033) are valid acts of the Legislature.

The Supreme Court of Ohio, in the case of State v. Powell, 58 O. S. 324, set forth graphically the purpose and meaning of these sections. The decision is pertinent to the issues in the instant case, especially on pages 340 and 341, where the court said:

> "The policy of Sunday laws is based upon the observed fact, derived from long experience and the custom of all nations, that periods of rest from ordinary pursuits are requisite to the well-being, morally and physically, of a people. If there were no such regularly recurring periods, there is reason to believe, that the masses would become morbid in body and mind, crime would multiply, and degeneracy likely ensue. Rest recuperates the mind and body, gives new life and hope to the people, and cheerfulness and health attend renewed labor; and, as has been well observed, more, under these circumstances can be accomplished in six days, than would otherwise be accomplished in seven."

In reading Section 13045 it seems clear the legislature fixed one day of rest in seven for those whose religious belief held the seventh day of the week to be Sabbath, and in Section 13044 it fixed the first day of the week as a day of rest for the group whose religious belief held the first day of the week as Sunday.

If this is not so, then what did the legislature mean by including in Section 13045 a provision that Section 13044 shall not extend to persons who conscientiously observe the seventh day of the week and abstain thereon from doing things herein prohibited on Sunday?

One may ask, "Abstain herein from doing what things"? The answer is clear. He must abstain from work on the seventh day of the week and use it as a day of rest.

If the legislature had failed to exempt from its operation those persons who conscientiously observed the seventh day of the week as the Sabbath, its constitutionality would have been weakened. (City of Canton v. Nist, 9 O. S. 439).

In the case of Rosen v. State of Ohio, (Page 278, 3 NP), the court said as follows:

> "In the case of People v. Bellet, 99 Mich., 151, the Supreme Court of Michigan upheld an act similar to the statute of Ohio, upon the theory that said act did not grant to any citizen or any class of citizens, privileges or immunities which did not belong equally to all citizens, but that the framers of the statute meant to leave it to the consciences and judgment of its citizens to judge between the first and the seventh day of the week, requiring only that on one or the other of these days they must refrain from any labor.
>
> "What then is the meaning of the seventh day of the week? The Legislature clearly had in mind two and only two classes of citizens. The Legislature found no other class of citizens whatsoever which needed any consideration by virtue of the constitutional privilege guaranteeing liberty of conscience and worship. These two classes consisted, first, of those who conscientiously observe the first day of the week as a day of rest, and all other persons who had no conscience in the matter whatever. The second class consisted solely of those who conscientiously observe the seventh day of the week as the Sabbath.
>
> "The word 'Sabbath' is from the Hebrew 'Shabbath' and signified a 'rest from labor'. It is mentioned first in Genesis ii. 2, 3, as the 'seventh day.' It is mentioned in Exodus xvi. 23 as the 'holy Sabbath,' and again Exodus xx. 8, as a day to be kept holy.
>
> "From the beginning of the history of these people, i.e., Jews and Seventh Day Adventists, who have observed the seventh day to keep it holy, that day has * * * commenced at starlight upon Friday evening, and ended at starlight upon Saturday evening. This custom of the use of the word 'Sabbath day,' and of its beginning and end, arose from the account of

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the creation of the world, beginning with Genesis i. 5, where after the long period of darkness and chaos, there was light. 'And the evening and the morning were the first day.' And so on was each day numbered as the evening and the morning, until the seventh day, and this last evening and morning, i.e., light following the darkness, was set apart as the day of rest, and has been so observed ever since by these people. It will be observed, therefore, that the statute has direct application to, and was meant to embrace and save from its operation the very people who have thus observed the seventh day, and it is significant that the section of the statute does not only mention the seventh day as a day, but makes this exemption applicable to the day as the Sabbath, distinguishing the word 'Sabbath' from the other word 'Sunday' used in the same act. While it is true that the words 'Sabbath' and 'Sunday' are often interchangeably used, yet they are not necessarily synonymous. It is the duty of the court, therefore, to so construe this statute that two results will follow: First, that the statute itself be given such a construction as will make it constitutional, and second, that it be given such a construction as will carry out the manifest intent thereof, and exempt from its operation those persons who were intended to be exempted."

If the legislature has mandated that workers shall rest one day in seven with an exception for work of necessity or charity, then the issues here should be confined to a determination of necessity (charity not being involved here) and a construction of the term "availability" as provided in Section 1345-6-a(4) of the Ohio General Code.

In the decision of the majority the findings of fact show the claimant was not employed by the H. J. Heinz Company because the claimant would not work from sundown Friday to sundown Saturday, the Sabbath day of the claimant.

It is not disputed that the claimant was a member of the group referred to in Section 13045 of the Ohio General Code and as such he was exempted from the provisions of Section 13044 because he abstained from doing those things

on the seventh day of the week. There is no showing of necessity or charity in the operations at the H. J. Heinz Company to the extent that these two sections (13044 and 13045) should not apply.

There is nothing in the record which shows that H. J. Heinz Company worked more than six days in a week. I am presuming they worked only six days a week and, if necessity is to be shown, it would require a showing that it was necessary for the plants to operate seven days in the week. Necessity can not be established by generalizing. The decision of the majority, in part, states as follows:

> "Thus, the standards by which availability of a particular individual is determined, depend to a large extent upon the type and character of work he is qualified to do. For example, at the present time, most industries engaged in the production of war materials are working three shifts a day. Individuals qualified to do this work must be available for work on any shift where a vacancy occurs. Some businesses customarily operate every day of the week,—notably drug stores, and individuals reasonably fitted for such work must be available for it on the days and during the hours that it is customarily performed."

The fact that some businesses, including drug stores, operate every day in the week is not prima facie that all businesses operate seven days a week, nor does it show necessity.

The fact that some industries operate twenty-four hours every day in the week, does not show necessity, or that a worker shall be available twenty-four hours a day or seven days a week. In many industries, the 40 hour or 48 hour week is observed mainly for the worker. We find, even in this need for increased production to carry on in this war, that it has been advisable, mainly as a health measure, to hold to the one day of rest in seven and to observe ceilings on hours of work.

There are many industries, whose production is vital in this war, operating so as to allow one day of rest in seven. We find the mines, many mills and factories, mercantile

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establishments, public offices, both state and private, operating on a six day basis with one day of rest, namely, Sunday, because they have not found it necessary to work on Sunday and are complying with Section 13044.

Let us now apply (in the absence of any showing of necessity) the above conditions to the H. J. Heinz Company which refused to employ the claimant because his Sabbath was on the seventh day, namely, Saturday. Does Section 13045 provide any protection to one of Jewish faith in observing his Sabbath on Saturday?

> "Section 13045. Exceptions.—The next preceding section shall not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things herein prohibited on Sunday, (R. S. 7033.)"

Can it be said that because all the other employees of H. J. Heinz Company are given their day of rest on the first day of the week, all others must conform thereto, and that this would meet fully with the provisions of Section 13045, as held in the decision of the majority in the instant case?

I do not think so. It seems to me that the two groups mentioned, (1) those who observe the first day of the week as a day of rest and (2) those who conscientiously observe the seventh day of the week as Sabbath, are expressly mandated to refrain from labor on one or the other of these days.

The fact that the employer in Cincinnati would not hire a claimant whose religious belief required him to abstain from work on the seventh day in the week does not show necessity. It might show inconvenience since it implies they did not choose to hire this claimant whose services were available for six days a week which included the first day of the week. The Army General Depot located in Columbus, for two or three hours each evening, is using the services of men who are employed at other work during the day, and apparently are adapting their operations to utilize available manpower.

The real issue in the instant case arises from the construction given by the decision of the majority to the term "availability" in the unemployment compensation law, Section 1345-6-a(4):

> "(4) is able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted;"

What logic can be claimed for a construction or a rule which, in effect, would require a worker to be available for work on his Sabbath or the day set aside as a day of rest by the Legislature? The Legislature included protective measures prohibiting others from requiring him to work on that day.

"In enacting Section 1345-6-a(4), for the purpose of determining availability, the legislature did not grant authority to disregard its other acts enacted for the safety and health of workers. The legislature did not intend that availability would require more than to be available for work under conditions which met those required by law for the safety, health and welfare of the worker. Would it not be unreasonable to hold a worker shall be available for work in excess of the maximum hours per day and week as enacted in the maximum hours law? Would it not be unreasonable to hold that a worker shall be available for work in which the legal sanitary requirements are not met? Is it therefore not unreasonable to hold that a worker shall be available for work on the Sabbath, disregarding the provisions of Sections 13044 and 13045 of the Ohio General Code?"

In the case of Johns v. The State, 78 Indiana, 332, the court, speaking of a similar statute in that state, said:

> "It was not the purpose of the law makers to compel any class of conscientious persons to abstain from labor upon two days in every week. Without the proviso, a large number of citizens would be compelled to lose two days of labor * * * A loading and controlling element of our system of government is that there shall be absolute freedom in all matters of religious belief. The statute here under examination

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is framed in harmony with this all-pervading and controlling principle."

The decision of the majority wherein it holds as provided in the last sentence of Rule 412—"This means he must be available each day of such week"—is in conflict with provisions of Sections 13044 and 13045. In order to remove from the field of unreasonability the holding and the rule, recognition must be given to the exceptions of certain days in the week which by law have been set apart as days of rest. In no uncertain terms the state has said to the Gentile and the Jew that on one day of each week he shall rest from his labors and only by a showing of necessity or charity can he depart therefrom.

The state fixed the first day of the week as Sunday for the Gentile and all others not of a belief who observed the seventh day of the week as Sabbath. The state fixed the seventh day of the week for those who conscientiously observed that day as the Sabbath.

The decision or Rule 412 should go no further than to hold that a worker should be available on work days and not require availability on the legal day of rest. The rule should also give credit for unemployment in such parts of the week as the worker was available.

It is my considered opinion that this decision should be reversed and claimant be held to be available for work as required in the Ohio Unemployment Compensation Law.

(Signed) W. T. Roberts,
Member.

Date of Mailing: September 25, 1944.

MEMORANDUM OPINION OF THE COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

(Filed November 15, 1944)

WOESTE, J.

The appellant, Max Kut, has appealed from a decision of a majority of the Board of Review of the Bureau of Unemployment Compensation of the State of Ohio handed

down September 25, 1944, which affirmed the disallowance of unemployment benefits to him on the ground that he was not available for work within the purview of the Ohio Unemployment Compensation Act and the Regulations thereunder.

The facts are not in dispute. Appellant was employed by Albers Super Markets, Inc., from June, 1943, to March 7, 1944. He is an Orthodox Jew who has always followed the traditional tenets of his religious faith, one of which precludes working from sundown Friday evening to sundown Saturday evening, this period being his Sabbath. While employed by Albers Super Markets, Inc., he had arranged to be off on his Sabbath and in lieu thereof worked Sunday afternoon and evening. In all of his prior employments he has never worked on his traditional Sabbath, but is available for work at all other times of the week, both day and night.

Because of meritorious service for his employer, he was given a promotion and an advance in salary. The attention of the employer was drawn to certain prevailing Union rules pertaining to seniority which inhibited this promotion. Rather than demote the appellant, the employer gave him a release. His employment was thus terminated. He was out of employment about four weeks. Two opportunities arose whereby he was offered employment which included service on Saturday. These he declined but eventually gained employment which permitted him to be absent on Saturday and thus observe his Sabbath.

Appellant applied for benefits under the Act but thereafter received a "Notice of Ineligibility" stating:

> "Facts available establish that the claimant is not available for work on a Saturday. He is therefore not available for work within the meaning of Section 1345-6-a-(4), General Code and Par. 412 of the Rules and Regulations."

On April 5, 1944, appellant filed an appeal from this determination and a hearing was held before a referee who handed down a decision affirming the disallowance of the claim. Appellant then appealed to the Board of

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Review of the Bureau of Unemployment Compensation. On or about September 25, two of the members of this Board of Review handed down a decision affirming the referee and denying appellant's claim for unemployment benefits. A dissenting opinion was filed by the third member of the Board of Review. Appellant thereupon filed his notice of appeal in this court in accordance with the provisions of General Code of Ohio, Section 1346-4.

The question before this Court on this appeal is whether an individual, who is otherwise qualified to receive unemployment benefits, must be denied such benefits solely on the ground that he is not available for work on his religious Sabbath, notwithstanding that he is available for work at all other times of the week.

Section 1345-6-a-(4) provides:

> "a. No individual shall be entitled to any benefits unless he or she
> "(4) is able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted; . . ."

Board Regulation 412 provides:

> "An individual may not receive credit for waiting period week or benefits for any week in which he was not physically or mentally able to work, or in which he was not available for work. This means that he must be available each day of such week."

Section 1345-13 authorizes the Administrator to adopt and enforce reasonable rules and regulations but this Court is of the opinion that Regulation 412, purporting to require an individual to be available every day of the week, including his day of rest, is not only unreasonable but also contrary to the rights of appellant under the Constitution and Statutes of Ohio. Section 1345-6-a-(4) which requires an individual to be able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted, means available for work according to the Constitu-

tion and Statutes of Ohio. Article I, Section 7, of the Ohio Constitution, provides that:

> "All men have a natural and indefeasible right to worship Almighty God according to the dicates of their own conscience . . . and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. . . ."

Section 13044, of the General Code of Ohio, prohibits labor on Sunday, and Section 13045 provides:

> "The next preceding section shall not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the Sabbath, and abstain thereon from doing things herein prohibited on Sunday."

How can an administrative regulation be deemed reasonable and valid which would require a workman to be available for work on his Sabbath when that day has been set aside as a day of rest by the Legislature. To require a worker to be available for work on his Sabbath, whether it be Sunday or Saturday, would be disregarding the provisions of Sections 13044 and 13045 and operate to give a preference in unemployment benefits to those religious groups and individuals who have no scruples about performing gainful labor on their Sabbath, all in violation of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States. This Court does not believe that the Legislature, in adopting the Ohio Unemployment Compensation Act, having in mind the beneficent purposes of that legislation, intended to make ineligible every individual who was not available for work on his day of rest even though he might be available at all other times of the week.

Regulation No. 412 as adopted by the Bureau of Unemployment Compensation, insofar as it denies the benefits of such compensation during unemployment to conscientious members of religious faiths who observe the

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seventh day of the week as their Sabbath, is violative of the constitutional rights of such persons. Unemployment insurance is a sample of benign governmental action calculated to serve as a measure of social security. The effective application of such legislation should be encouraged by the courts and a broad interpretation placed upon the provisions of the law so as to effectuate the accomplishment of its spirit and purpose.

By this finding the Court does not work an unreasonable hardship on the Bureau's fund. An applicant who is a member of a religious faith who observes Saturday as his Sabbath and claims benefits under this law must not be deprived of such if it is clearly evident that he is a concientious observer of his religious tenets.

The decision of the majority of the Board of Review, sustaining the Administrator in holding appellant ineligible for unemployment benefits, is contrary to law and should be reversed.

An entry may be drawn accordingly.

JUDGMENT ENTRY OF REVERSAL ENTERED BY COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

(December 11, 1944)

This cause came on to be heard on the appeal of Max Kut, Appellant, v. Albers Super Markets, Inc., B. Manischewitz Co., Blue Bird Pie Co., George Wiedemann Brewing Co., Inc., and the Bureau of Unemployment Compensation of the State of Ohio and Board of Review thereof, Appellees, from the decision of the Board of Review of the Bureau of Unemployment Compensation of the State of Ohio handed down September 25, 1944, which affirmed the decision of the referee, dated May 4, 1944, and disallowed and denied the application of Appellant for unemployment benefits, dated March 16, 1944, and further came on to be heard on the transcript and original papers

and pleadings, was argued by counsel and submitted to the Court; on consideration whereof the Court finds:

1. That appellant has duly perfected his appeal to this Court in accordance with the provisions of General Code of Ohio, Section 1346-4.

2. That the appellant is an orthodox Jew who has always followed the traditional tenets of his religious faith and abstained from work from sundown Friday evening to sundown Saturday evening, which period is his Sabbath.

3. That appellant voluntarily quit his work at Albers Super Markets, Inc., on March 7, 1944, for just cause and did not secure other employment until April 4, 1944.

4. That the decision of the Board of Review denying Appellant's claim on the ground that he was not available for work because he refused to work on his Sabbath is unreasonable and contrary to the Constitution and the law of Ohio.

It is therefore ordered, adjudged and decreed that the decision of the Board of Review herein be, and hereby is, reversed, set aside and held for naught. That claimant be held as available and his claim allowed and benefits be paid in accordance with the unemployment compensation law. It is ordered that the Board of Review pay the costs taxed herein. To all of which the Board of Review excepts.

OPINION OF THE COURT OF APPEALS

(Filed June 4, 1945)

SYLLABUS

BY THE COURT:

An employee may not claim unemployment compensation where he refuses employment requiring work on Saturday, because of conscientious scruples, he being otherwise fully capable of performing the duties inci-

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dent to such employment by reason of physical and mental ability and past experience.

Hamilton County, No. 6495

ROSS, J.:

This is an appeal on questions of law from a judgment of the Court of Common Pleas of Hamilton county, reversing an order of the Board of Review of the Bureau of Unemployment Compensation, denying the plaintiff unemployment compensation.

The facts admitted by plaintiff are that:

Max Kut was employed by Albers Super Markets, Inc., in June, 1943, as an order clerk with the understanding that he would be advanced to a higher job within a reasonable time. He continued as an order clerk until about November 15, 1943, at which time he was assigned to duty as a "checker" but without receiving the pay of a regular "checker." After receiving repeated promises that he would receive the wages of a regular checker, he was finally put on the payroll at such higher rate, but the union objected, on the ground that he was being promoted in advance of other employees who had acquired more seniority. Since the only work that Albers Super Markets, Inc., had to offer was to return him back as order clerk, at which he had started, the employer assumed that this would not be satisfactory to Kut and gave him his release, thus terminating his employment on March 7, 1944.

Kut is an orthodox Jew who has always followed the traditional tenets of his religious faith, one of which precludes working from sundown Friday evening to sundown Saturday evening. This period constitutes his Sabbath during which time labor is prohibited. While employed by Albers Super Markets, Inc., Kut had arranged to be off his Sabbath and in lieu thereof worked Sunday afternoon and evening.

Kut was out of employment for about four weeks. On March 9, 1944, he was given a referral by the United States Employment Service to the Bardes Range and Foundry Company as a shipping clerk. Kut accepted

this employment, but when the company learned that he could not work on Saturday, they refused to employ him. He was then given a referral to The H. J. Heinz Company as a shipping clerk, but this company also refused to hire him unless he was willing to work on Saturday. Except for his Sabbath Kut was available for work at all other times of the week, both day and night. He remained unemployed until April 4, 1944, when he obtained a job with George H. Thomas, where he was not required to work on his Sabbath.

On or about March 24, 1944, Kut received a "Notice of Ineligibility" stating "Facts available establish that the claimant is not available for work on a Saturday. He is therfore not available for work within the meaning of Section 1345-6-a-(4), General Code and Par. 412 of the Rules and Regulations."

On April 5, 1944, Kut filed an appeal from the determination of the Administrator and a hearing was held before Edward J. Hayes, a referee for the Ohio Bureau of Unemployment Compensation. The referee banded down his decision on May 4, 1944, holding that Regulation 412 required Kut to be available for work each day of the week, including his traditional Sabbath, and that since he was not so available he was ineligible for benefits. The referee further held that this Regulation did not violate any statutory or constitutional rights of the claimant.

On May 9, Kut made application for permission to institute a further appeal before the Board of Review. His application was allowed and the appeal heard on June 21, 1944.

The Board of Review denied the plaintiff's application for unemployment compensation. Such order was made in conformity to the provisions of section 1345-6a (4), General Code:

> "Each eligible individual shall receive benefits as compensation for loss of remuneration due to total or involuntary partial unemployment in the amounts and subject to the conditions stipulated in this act; but no benefits shall be paid for total or partial unemployment occurring prior to January 1, 1939.

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"a. No individual shall be entitled to any benefits unless he or she

* * * * * * *

"(4) is able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted; * * *."

Section 1345-13, General Code, provides:

"(a) In addition to all other duties imposed on the administrator and powers granted by the provisions of this act, the administrator shall have full power:

"(1) To adopt and enforce reasonable rules and regulations relative to the exercise of his powers and authority, * * *."

Board regulation No. 412 provides:

"TOTAL DISQUALIFICATION. An individual may not receive credit for waiting period week or benefits for any week in which he was not physically or mentally able to work, or in which he was not available for work. This means that he must be available each day of such week."

Section 1345-1-m, General Code, provides:

"'Week' means the calendar week ending at midnight Saturday unless an equivalent week of seven consecutive calendar days is prescribed by the administrator."

This section is a part of an act as it became effective September 28, 1943. The same act was amended on May 14, 1941, and became effective October 1, 1941. (119 Ohio Laws, p. 827.) The language of paragraph "m" was as is in the present act. Previous to that in the act passed April 20, 1939, this paragraph "m" read:

"m. 'week' means such period or periods of seven consecutive calendar days as the administrator may by regulations prescribe."

Section 1345-5, General Code, provides:

> "No agreement by an employee to pay any portion of the contribution or other payment required to be made by his employer under this act, shall be valid; and no employer shall make a deduction for such purposes from the remuneration or salary of any individual in his employ. But nothing in this act shall affect the validity of voluntary arrangements by which employees individually or collectively agree to make contributions for the purpose of securing benefits in addition to those provided by this act."

Section 1345-2, General Code, provides:

> "(a) There is hereby created an unemployment compensation fund (hereinafter called the unemployment fund), to be administered by the state of Ohio, without liability on the part of the state beyond the amounts paid into the fund and earned by the fund. This unemployment fund shall consist of all contributions collected under this act, together with any interest thereon collected pursuant to this act, all fines and penalties collected pursuant to the provisions of this act, all interest earned upon any moneys in the fund, any property or securities acquired through the use of moneys belonging to the fund, and all earnings of such property or securities. The unemployment fund shall be used to pay benefits and refunds as provided by this act and for no other purpose."

Under such facts and the law, the question presented is whether or not an employee may collect unemployment compensation, when he refuses to accept employment offered to him, because such employment requires him to work on Saturday, his sole reason for refusing such proffered employment being that the religion to which he adheres prohibits labor from "sundown Friday evening to sundown Saturday evening."

It is necessary to dispose of one contention of the plaintiff at once. Reliance is placed upon the provisions of section 13045, General Code, by plaintiff, his contention being that

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that section puts work on Saturday for those "persons who conscientiously observe the seventh day of the week as the Sabbath and abstain thereon from doing things herein prohibited on Sunday," in the same category as work on Sunday for other persons.

Such contention is untenable and this section in no way avails to aid in the disposition of the issue presented. In the first place it is evident that no person could be charged with any offense simply because he performed on Saturday any of the acts forbidden on Sunday, regardless of his religious belief. Section 13044, General Code, and other sections in the Chapter on Sabbath desecration define crimes and provide punishment for certain acts performed upon Sunday. Section 13045, General Code, simply provides that persons holding certain religious beliefs shall not be amenable to the punishment provided for other persons who perform forbidden acts on Sunday. In so far as it does so, it is discrimination in favor of such persons holding such religious beliefs, and against those who do not hold such beliefs. The effects of these statutes is not to provide *two* days upon which labor is illegal. There is no reason why the plaintiff could not have accepted the proffered employment and still not have violated any law or statute. His sole reason was that his religious belief prevented his accepting such employment.

Plaintiff also places reliance upon Art. I, section of the Ohio Constitution. Let us examine the provisions of this section in the light of the facts herein involved.

Nothing in the refusal to grant compensation to the plaintiff can be considered in any way an interference with his right to worship in any manner he sees fit or any interference with his rights of conscience. If he wishes to attend his church on Saturday that is his right. No one is attempting to interfere with that constitutional privilege. But what the plaintiff is saying is that, although my conscience will not permit me to work on Saturday, I should receive the same compensation as if it did not, and that if you refuse to give me such unemployment compensation, you are discriminating against me. In passing it will be noted that the section of the Constitution referred to also provides "and no preference shall be given by law to any

religious society." Only by the employment of invers logic can the plaintiff claim discrimination in the refusal t grant him unemployment compensation.

If the judgment of the Court of Common Pleas be sus tained, certainly, there would be discrimination, but i favor of the plaintiff. All other persons except those hold ing conscientious scruples would be required to accept em ployment and be barred from such compensation if they di not. Certainly, this could be nothing less than discrimina tion against them.

The predicament of the plaintiff is not overlooked. H is bound by his conscience to refuse work on Saturday. I work on that day is offered, he feels he must refuse it. I he accepts the work, he, of course, will not be entitled t unemployment compensation. If he refuses the work, the he has denied his availability for it and disqualified himsel for compensation.

His solution is to refuse the work and still claim unem ployment compensation. This he cannot do, for he ha rendered himself not available.

Nothing in Art. XIV, section 1 of the Constitution of th United States requires that unemployment compensatio be given to one who refuses for any reason to work upo any day of the week, not excluded by law as a day of labo

For these reasons, the judgment of the Court of Commo Pleas is reversed and the order of the Board of Review i affirmed.

HILDEBRANT, P. J., MATTHEWS & ROSS, J. J. CONCUR IN SYLLABUS, OPINION & JUDGMENT

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JUDGMENT ENTRY OF REVERSAL ENTERED BY COURT OF APPEALS

(Entered June 22, 1945)

No. 6495

This cause came on to be heard on appeal on question of law, filed by the Bureau of Unemployment Compensatio of the State of Ohio and the Board of Review thereof, a

defendants-appellants, from a judgment of the Common Pleas Court of Hamilton County, Ohio, entered on December 11, 1944, and further came on to be heard on the certified transcript of the record of the proceedings before the Bureau of Unemployment Compensation of the State of Ohio and before the Board of Review thereof, and of the evidence considered by said Board of Review, the transcript of the docket and journal entries in the Common Pleas Court, and on the original papers and pleadings, was argued and briefed by counsel and submitted to the Court.

Upon consideration whereof, the Court finds that no constitutional rights of plaintiff-appellee under either the Constitution of Ohio or under the Constitution of the United States have been infringed by defendants-appellants; that there was prejudicial error in the judgment of the Court of Common Pleas of Hamilton County, in reversing the decision of the Board of Review, denying unemployment compensation to plaintiff-appellee; and that the judgment of the Court of Common Pleas of Hamilton county should be reversed and the decision of the Board of Review affirmed.

THEREFORE, IT IS ORDERED, ADJUDGED and DECREED by the Court that the judgment of the Court of Common Pleas of Hamilton county be, and the same hereby is, reversed and set aside, and that the decision rendered by the Board of Review be, and hereby is, affirmed; that the defendants-appellants have judgment against the plaintiff-appellee for their costs herein expended.

It is further ORDERED that this cause be, and hereby is, remanded to the Court of Common Pleas of Hamilton county for execution of this judgment and for further proceedings according to law.

To all of which, plaintiff-appellee excepts.

Statement of the Case.

KUT, APPELLANT, *v.* ALBERS SUPER MARKETS, INC., ET AL., APPELLEES.

Unemployment compensation—Claimant refusing to work on Saturdays, not entitled to benefits—Claimant not available for work in usual trade occupation, when—Section 1345-6 a (4), General Code—Right to religious freedom or equal protection, not violated—Section 7, Article I, Constitution of Ohio—Section 1, Article XIV, Amendments to U. S. Constitution—Rules and regulations of Administrator of Bureau of Unemployment Compensation—Section 1345-13 (a) (1), General Code—Regulations not affect substantive rights or conflict with statute—Employee refused to accept former position and quit work.

(No. 30456—Decide May 1, 1946)

APPEAL from the Court of Appeals of Hamilton county.

The plaintiff, Max Kut, filed an application with the Bureau of Unemployment Compensation of the state of Ohio for unemployment benefits for the week beginning March 5, 1944.

The application was disallowed by the administrator on the following ground:

"Facts available establish that the claimant is not available for work on a Saturday. He is therefore not available for work within the meaning of Section 1345-6 a (4), General Code, and Par. 412 of the Rules and Regulations."

The plaintiff perfected an appeal to the Board of Review of the Bureau of Unemployment Compensation. A hearing was had before a referee, and the decision of the administrator was affirmed. Then, upon a hearing before the Board of Review itself, the decision of the referee was affirmed.

The plaintiff appealed to the Court of Common pleas. The decision of the Board of Review was reversed, and a final judgment was rendered in favor of the plaintiff.

The Board of Review then perfected an appeal to the Court of Appeals on questions of law. That court reversed

the judgment of the Court of Common Pleas and affirmed the decision of the Board of Review.

After this tortuous, statutory course involving the original hearing and four reviews already, the case is at last in this court for a fifth review upon the allowance of the plaintiff's motion to certify the record.

Messrs. Paxton & Seasongood and *Mr. Lester A. Jaffe*, for appellant.

Mr. Hugh S. Jenkins, attorney general, and *Mr. John M. Woy*, for appellees.

By the Court. The controlling facts in the case are not in dispute.

The plaintiff formerly was employed as an order clerk and as a checker by the defendant, the Albers Super Markets, Inc. That employment was terminated by the refusal of the plaintiff to continue to perform the work assigned to him. Several days later he was referred to two companies, each of which was willing to employ him as a shipping clerk. However, each company refused to accept him for the reason that he refused to work on Saturday which is the day the plaintiff says he observes as his Sabbath.

Hence, the question presented is whether the plaintiff was available during the entire week for work in his usual trade or occupation as required by Section 1345-6 a (4), General Code, which reads in part as follows:

"a. No individual shall be entitled to any benefits unless he or she * * *

"(4) is able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted; * * *."

It is not disputed that the type of work offered to the plaintiff was "work in his usual trade or occupation." The substance of his contention is (1) that under the above-quoted provision of the statute he may not be required to be available for work on Saturday, and (2) that if this provision is so construed it is violative of Section 7 of Article I of the Constitution of Ohio and Section 1 of the

Fourteenth Amendment to the Constitution of the United States.

The statute does not designate particular days of the week. It provides that in order to be entitled to benefits a claimant must be "able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted." Hence, he must be available for work on Saturday if this is required by his usual trade or occupation, as in this instance.

Is this provision of the statute a violation of the constitutional right to religious freedom or the right to equal protection of the laws? The plaintiff, like everyone else, is free to choose both his religion and his trade or occupation. If in making these voluntary choices he renders himself unavailable for work in his chosen trade or occupation or in any other for which he is reasonably fitted, he, like everyone else who fails to comply with the statutory requirement, is not entitled to unemployment benefits. Hence, the statute is not unconstitutional.

The plaintiff complains about Regulation 412 promulgated by the administrator and approved by the Board of Review. This reads as follows:

"An individual may not receive credit for waiting period week or benefits for any week in which he was not physically or mentally able to work, or in which he was not available for work. This means that he must be available each day of such week."

The last sentence is substantive and is in conflict with the statute which requires simply that a claimant must be "available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted." Thus, it may or may not be necessary for a claimant to be available each day of the week, depending on his usual trade or occupation or any other for which he is reasonably fitted. Under the provisions of Section 1345-13 (a) (1), General Code, the administrator is authorized to adopt reasonable procedural rules and regulations relative to the exercise of his powers and authority.

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However, he is not authorized to adopt rules or regulations relating to substantive rights, such as the last sentence of Regulation 412. Such an attempted authorization would be an unconstitutional delegation of legislative power by the General Assembly to an administrative agency. Hence, the questioned provision is of no effect and is not considered by this court in reaching its conclusion.

The plaintiff cites the penal provisions of Sections 13044 and 13045, General Code, relating to the performance of certain labor on Saturday and Sunday. However, these have no application to the circumstances of the instant case.

Finally, it is important to note that the plaintiff has imposed a further difficulty upon himself. His employment with the Albers Super Markets, Inc., was terminated not because of the particular days he was required to work but for the reason that he simply refused to continue to perform duties he previously had discharged for this company which allowed him the special privilege of working on Sunday instead of Saturday. As an employee of this company his first position was that of an order clerk. Subsequently he became a so-called checker. This caused certain difficulties, and the company then offered to restore the plaintiff to his original position as an order clerk. However, he refused and quit, thus making himself unavailable for work—a direct violation of the statute which was not designed for the purpose of protection against unemployment that is voluntary.

The disallowance of the plaintiff's claim for unemployment benefits was not erroneous, and the judgment of the Court of Appeals must be affirmed.

Judgment affirmed.

WEYGANDT, C. J., WILLIAMS, TURNER, MATTHIAS and HART, JJ., concur.

ZIMMERMAN and BELL, JJ., concurring. We concur in the judgment upon the sole ground that when appellant refused the offer of the company to restore him to his original position as an order clerk and quit his job he thereby forfeited his right to unemployment compensation.

SUPREME COURT OF OHIO

No. 30-456

MAX KUT, Plaintiff-Appellant,

vs.

ALBERS SUPER MARKETS, INC., B. Manischewitz Co., Blue Bird Pie Co., George Wiedemann Brewing Co., Inc. and Bureau of Unemployment Compensation of the State of Ohio, and Board of Review thereof, Defendants-Appellees

STIPULATION REGARDING PRINTING OF RECORD

It is stipulated by counsel for the parties that the Court be requested to authorize the omission for printing of the record of the following matter:

1. The proceedings before the Bureau of Unemployment Compensation, it being agreed that the opinion and judgment of the Common Pleas Court and the opinion and judgment of the Court of Appeals correctly and sufficiently present the facts necessary to be considered by the Court.

2. It is agreed that the opinion of the Court of Common Pleas and the judgment entry of reversal entered by the Common Pleas Court, the opinion of the Court of Appeals and the judgment entry of reversal entered by the Court of Appeals, all as printed in the appendix to plaintiff-appellant's brief, pp. 25-39, need not be reprinted as such or as included in the transcript of docket and journal entries.

(S.) PAXTON & SEASONGOOD,
Attorneys for Plaintiff-Appellant.
(S.) HUGH S. JENKINS,
Attorney General.
(S.) JOHN M. WOY,
Assistant Attorney General.
Attorney for Defendants-Appellees.

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No. 338

Supreme Court of the United States

MAX KUT,

Appellant,

v.

ALBERS SUPER MARKETS, INC., B. MANISCHEWITZ CO., BLUE BIRD PIE CO., GEORGE WIEDEMANN BREWING CO., INC.,

Defendants,

and

BUREAU OF UNEMPLOYMENT COMPENSATION OF THE STATE OF OHIO, AND BOARD OF REVIEW THEREOF,

Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

MURRAY SEASONGOOD,
LESTER A. JAFFE,
Attorneys for Appellant.

PAXTON & SEASONGOOD,
Of Counsel.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

No. ———

Supreme Court of the United States

MAX KUT,

Appellant,

v.

ALBERS SUPER MARKETS, INC., B. MANISCHEWITZ CO., BLUE BIRD PIE CO., GEORGE WIEDEMANN BREWING CO., INC.,

Defendants,

and

BUREAU OF UNEMPLOYMENT COMPENSATION OF THE STATE OF OHIO, AND BOARD OF REVIEW THEREOF,

Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

By stipulation of counsel for the parties, filed in the Supreme Court of Ohio, the record omitted the proceedings before the Bureau of Unemployment Compensation, "it being agreed that the opinion and judgment of the Common Pleas Court and the opinion and judgment of the Court of Appeals *correctly and sufficiently present the facts* necessary to be considered by the court".

The facts, as set forth in said opinions and judgments, are that appellant was employed in June, 1943, as an order

clerk by Albers Super Markets, Inc., with the understanding that he would be advanced to a higher job within a reasonable time; that he is an orthodox Jew who has always followed the traditional tenets of his religious faith, one of which precludes him from working from sundown Friday evening to sundown Saturday evening, this period being his Sabbath; that while so employed, he had arranged to be off on his Sabbath and in lieu thereof worked Sunday afternoon and evening; that in all his prior employments he had never worked on his traditional Sabbath, but was available for work at all other times of the week, both day and night; that because of meritorious service for his employer he was given a promotion as a "checker," but without receiving the pay of a regular checker; that after receiving repeated promises that he would receive the wages of a regular checker, he was finally put on the payroll at a higher rate; that the union objected on the ground that he was being promoted in advance of other employees who had acquired more seniority; that since the only work that his employer had to offer was to demote him to an order clerk, at which job he had started, the employer assumed that this would not be satisfactory to him and gave him his release, thus terminating his employment on March 7, 1944; that appellant voluntarily quit his work "for just cause" and did not secure other employment until April 4, 1944; that between March 7 and April 4, two opportunities arose whereby he was offered employment which required work on his Sabbath, which opportunities he declined; and that on April 4, 1944 he obtained employment which permitted him to be absent from work on his Sabbath.

In appellees' motion to dismiss or affirm, four reasons are advanced in support of such motion. We shall consider briefly each of these in turn.

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I.

Although appellees assert that the record does not show that the federal question was reserved by the appellant in the state courts, the record shows, beyond dispute, that the federal question was raised and argued initially before the referee who heard the appeal from the decision of the Administrator disallowing appellant's claim, and thereafter before the Board of Review, the Common Pleas Court, the Court of Appeals and the Supreme Court of Ohio. See paragraphs 5 to 9, both inclusive, of appellant's "Jurisdictional Statement" where specific references to the repeated raising and consideration of the federal question are set forth.

II.

The decision of the Supreme Court of Ohio does not rest upon a tenable non-federal ground. Although the Supreme Court stated in its opinion that appellant had voluntarily quit his employment, "thus making himself unavailable for work—a direct violation of the statute which was not designed for the purpose of protection against unemployment that is voluntary" (146 O. S. 522, 526), such finding is directly contrary to the undisputed facts and has no support in the record. As already set forth herein, counsel for the parties stipulated in writing, in connection with the preparation of the record for the Supreme Court of Ohio, that the opinions and judgments of the Common Pleas Court of Hamilton County, Ohio, and of the Court of Appeals for the First Appellate District of Ohio, correctly and sufficiently presented the facts. The Common Pleas Court found that appellant voluntarily quit his work at Albers Super Markets, Inc., on March 7, 1944 "*for just cause.*" The Court of Appeals found that the employer assumed that appellant's demotion "would not be satisfactory to Kut and gave him his release, thus terminating his employment on March 7, 1944."

Such a stipulation, either as to facts or as to the contents of the record, is binding upon the parties thereto. *Ish* v. *Crane*, 13 O. S. 574 (1862); *Garrett* v. *Hanshue, et al.*, 53 O. S. 482 (1895); *In re Estate of Henry A. Monfort*, 193 Minn. 594 (1935); 50 *Am. Jur.* 610, Sec. 9. Nor can this doctrine be avoided by calling the stipulation an abstract of the record. 4 *C. J. S.* 1479, Sec. 989a.

A court is not warranted in going beyond the record as so stipulated. See *Home for Incurables* v. *City of New York*, 187 U. S. 155 (1902); *Louden Machinery Co.* v. *Day*, 105 Vt. 520 (1932); *Shoener* v. *Schuylkill County*, 107 Pa. Super. 114 (1932); 4 *C. J. S.* 1479, Sections 989, 998 and 1005.

Moreover, no issue was made by appellees in any of the courts below that appellant had not terminated his employment for just cause. (See Jurisdictional Statement, paragraph 9.) As Judge Williams of the Supreme Court of Ohio aptly held in his concurring opinion in *Central Trust Company* v. *Watt*, 139 O. S. 50 (1941) at p. 70:

> "After all, what power has this court on review to determine an issue not made in the lower courts?"

See also *Carney* v. *Dayton Power, Etc. Co.*, 67 N. E. (2d) 122, 124, — O. A. — (1946); *Peoples Savings Bank, etc.* v. *Foureman*, 67 N. E. (2d) 97, 98, — O. A. — (1946). The official citation to these two cases is not available at this time.

Even if it were permissible for the Supreme Court of Ohio to go outside the stipulated record before it with a view to attempting to establish that appellant voluntarily quit his work without just cause, still he would have been entitled to compensation under the Ohio Unemployment Compensation statute then in effect (G. C. Sec. 1345-6, as amended in 120 O. L., pp. 666, 682). Under that statute,

individuals who quit their work without just cause merely had a longer waiting period than those who quit for just cause.

Although counsel for appellees now contend that the only question before the Board of Review or any of the Ohio courts was whether appellant was entitled to benefits, this was not appellees' position prior to the filing of the motion to dismiss or affirm. On the contrary, in the brief of appellees before the Supreme Court of Ohio (page 12) it is stated:

> "The sole question, then, is whether he had a right to refuse the offer of work on the ground that he would not work on Saturdays because of his religion."

That is the substantial constitutional question that was involved throughout all of the prior proceedings; it remains the substantial federal constitutional question on appellant's appeal to this Court.

III.

It is urged that this Court is bound by the interpretation of the Supreme Court of Ohio on state statutes aside from any federal question. We have no quarrel with this statement as a general proposition, but it has no application to this appeal because, as herein shown, the federal question was raised and considered at every stage of the proceeding; the federal question is substantial and remains the same under the statute as interpreted by the Supreme Court of Ohio and under the statute as interpreted by the Administrator of the Bureau of Unemployment Compensation, and a review by the Supreme Court of the United States of this substantial federal question involved cannot be prevented by the Supreme Court of Ohio basing its decision in part on a non-federal ground that is unsubstantial and illusory.

IV.

That the Supreme Court of Ohio thought that a constitutional question was involved is evidenced by the fact that that court, after appellant appealed as of right on constitutional grounds, overruled appellees' motion to dismiss such appeal as of right. Under the decision of the Supreme Court of Ohio, the only way appellant is free to observe his Sabbath is by foregoing all rights to unemployment benefits, notwithstanding his employers, who are required by the taxing power to pay into the fund for such benefits, had employed him knowing that he was unavailable for work on his Sabbath. Not only does this constitute a tax levied for the benefit of adherents of certain religions exclusively, but appellant may enjoy his religious right of not working on his Sabbath only by necessarily foregoing an economic right in the form of unemployment compensation benefits. The state statute, as interpreted by the Supreme Court of Ohio, would, in practical operation, interfere with freedom of religion and would discriminate against those individuals who have religious scruples about performing gainful labor on their Sabbath. This is contrary to the principles established in *Minersville District* v. *Gobitis*, 310 U. S. 586 (1940); *Board of Education* v. *Barnette*, 319 U. S. 624 (1943), and *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

We urge, therefore, that appellees' motion to dismiss or affirm be overruled and that probable jurisdiction be noted on this appeal.

Respectfully submitted,

MURRAY SEASONGOOD,
LESTER A. JAFFE,
Attorneys for Appellant.

PAXTON & SEASONGOOD,
Of Counsel.

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JUL 27 1946

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 338

MAX KUT,

Appellant,

vs.

BUREAU OF UNEMPLOYMENT COMPENSATION OF THE STATE OF OHIO, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

HUGH S. JENKINS,
Attorney General of Ohio,
E. G. SCHUESSLER,
Chief Counsel,
JOHN M. WOY,
Assistant Attorney General of Ohio,
Counsel for Appellees.

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SUPREME COURT OF OHIO

No. 30456

MAX KUT,

Plaintiff-Appellant,

vs.

ALBERS SUPER MARKETS, INC., B. MANISCHEWITZ CO., BLUE BIRD PIE CO., GEORGE WIEDEMANN BREWING CO., INC., *Defendants,*

and

BUREAU OF UNEMPLOYMENT COMPENSATION OF THE STATE OF OHIO, AND BOARD OF REVIEW THEREOF, *Defendants-Appellees.*

STATEMENT MAKING AGAINST THE JURISDICTION OF THE UNITED STATES AND MOTION TO DISMISS OR AFFIRM

Statement Against Jurisdiction

The Bureau of Unemployment Compensation of the State of Ohio and the Board of Review thereof respectfully submit that the Supreme Court of the United States does not have jurisdiction of this attempted appeal for the following reasons, to-wit:

I

The Record Herein Does not show that the Federal Question was Reserved by the Appellant in the State Courts

The burden is upon appellant to make an affirmative showing by the record that the federal question was properly raised. This appellant has failed to do.

Chicago, Ind. & L. Ry. Co. v. *McGuire*, 196 U. S. 128.

II

The Decision of the Supreme Court of Ohio rests upon a State Ground which Independently and Adequately supports the Judgment

The Supreme Court of Ohio, in addition to and independent of any federal question, placed its decision and judgment upon a state ground which adequately supports its judgment.

The record, which is on file in the Supreme Court, shows that the appellant refused to return and accept his former job with this employer, a job for which he was reasonably fitted and which did not require him to work on his Sabbath. That, under the unemployment compensation law of Ohio, this disqualified him to receive benefits and in no way involved any constitutional or federal question.

Bell Telephone Co. of Pa. v. *VanDyke*, 296 U. S. 533,
Fox Film Corp. v. *Mueller*, 296 U. S. 207,
Enterprise Irrig. Dist. v. *Canal Co.*, 243 U. S. 157,
Richardson Machine Co. v. *Scott*, 276 U. S. 128,
Lynch v. *New York*, 293 U. S. 52,
Wade Holley v. *R. H. Lawrence, Warden*, 317 U.S. 518.

III

The United States Supreme Court is bound by Ohio Supreme Court on Interpretation of State Statutes aside from any Federal Question

Senn v. *Tile Layers Prot. Union*, 301 U. S. 468,
Campbell v. *Olney*, 262 U. S. 352,
Douglas v. *New York, N. H. and H. R. Co.*, 279 U. S. 377.

IV

No Substantial Federal Question Involved

The Ohio unemployment compensation law does not, in any way, abridge the privileges or immunities of the ap-

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pellant; nor deprive him of life, liberty or property without due process of law; nor deny him the equal protection of the law. There is no discrimination, it applies to all alike.

The Supreme Court of Ohio held that the statute did not violate the constitution of Ohio. The Supreme Court of the United States is bound by that interpretation.

Senn v. *Tile Layers Prot. Union*, 301 U. S. 468,
Lynch v. *New York*, 293 U. S. 52.

This case arose when appellant filed a claim for benefits with the Bureau of Unemployment Compensation. The Administrator denied the benefits and appellant appealed to the Board of Review of the Bureau of Unemployment Compensation. A trial of this matter, at which testimony was introduced, was had before the said Board of Review. This is in accordance with Section 1346-4, General Code of Ohio. The Board of Review, upon the conclusion of the trial and the introduction of all of the evidence, rendered its finding and decision. In this finding it found as follows:

> "Claimant was employed by the Albers Super Markets, Inc., June 21, 1943, as an order clerk. He continued in this capacity until about November 15, 1943, at which time he was assigned to duties as a checker. Early in March, 1944, the Union objected to claimant being promoted in advance of other employees who had acquired more seniority. Employer was therefore required to relieve claimant of his duties as a checker and offered to transfer him to his former work as an order clerk, but claimant refused to return to this work. His employment terminated March 7, 1944."

The appellant then took an appeal under the provisions of the aforementioned section to the Common Pleas Court of Hamilton County. This is not an appeal on which the matter is tried *de novo*. It is in the nature of an error proceeding and it is heard and argued upon the record which

is made before the Board of Review, a transcript of which it is required to file with the Common Pleas Court. This Section 1346-4 of the General Code of Ohio, among other things, provides:

> "The board (,) upon written demand filed by an appellant, shall within thirty days after the filing of such demand, file with the clerk of such court a certified transcript of the record of the proceedings pertaining to the decision complained of, and the evidence considered by the board or the referee, or both, in making such decision and the appeal shall be heard upon such transcript and the evidence certified by the board of review. Such transcript and evidence upon being filed with the clerk of the courts shall become and be a part of the record in the case, without being included in a bill of exceptions. After an appeal has been filed in the common pleas court, the administrator or the board of review may, by petition, be made a party to such appeal. If the common pleas court shall find that the decision was unlawful, unreasonable, or against the manifest weight of the evidence it shall reverse and vacate the same or it may modify the same and enter final judgment in accordance with such modification; otherwise such court shall affirm such decision. Any party shall have the right to appeal from the court of common pleas as in ordinary civil cases."

Our courts have held that this appeal is an error proceeding and not a trial *de novo* and that no evidence can be introduced thereon.

> *Brown-Brockmeyer* v. *Board of Review*, 70 O. A. 370, *Hauswirth* v. *Board of Review*, 69 O. A. 79.

The record in this case was made at the trial or hearing held by the Board of Review. This record was certified to the Common Pleas Court of Hamilton County, pursuant to the above statute, and became a part of the record without further proceedings. This record was then later certified by the Common Pleas Court to the Court of Appeals for

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Hamilton County and later was certified by it to the Supreme Court of Ohio and was the original record before the Supreme Court of Ohio on which it heard and decided this case. Appellant just had a short abstract of the record made, leaving out all of the record except the transcript of the docket and journal entries in the Common Pleas Court, assignment of error and the transcript of the docket and journal entries in the Court of Appeals. Nevertheless, the original record, which contains the evidence produced at the trial or hearing of this case before the Board of Review was before the Supreme Court and is the only record in this case.

The Supreme Court rightfully looks to and relies on this original record. The giving of permission to the appellant to just print a meagre abstract of the record did not take the place of the original record nor did it prevent the court from examing the original record or basing its decisions upon the facts and testimony found in said original record.

The Supreme Court of Ohio, in rendering its decision and judgment, definitely and clearly rested its decision upon a non-federal ground, in interpreting the Ohio unemployment compensation law which was independent of any federal question and which said non-federal ground adequately supports its judgment. Section 1345-6 of the General Code of Ohio provides, among other things:

> "a. No individual shall be entitled to any benefits unless he or she
>
> "(4) is able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted; and
>
> "(5) is unable to obtain work in his usual trade or occupation or any other employment for which he is reasonably fitted including employments not subject to this act.
>
> "d. Notwithstanding the provisions of subsection (a) of this section, no individual may serve a waiting

period or be paid benefits for the duration of any period of unemployment with respect to which the administrator finds that such individual:

"(2) has refused to accept an offer of work for which he is reasonably fitted, or has refused to accept a referral to a job opportunity when directed to do so by a local employment office of this state or another state;"

In the evidence which was taken at the hearing before the Board of Review and which is in the transcript of the record which it certified to the courts, and which was before the Supreme Court of Ohio, it appears by uncontradicted evidence of the employer that after it was required to remove Kut from the job as checker, it offered to return him to his former job as order clerk in which he had worked for a number of months and on which he did not have to work on his Sabbath, and that he refused to take his old job. And in the testimony of Mr. Kut, taken at the hearing, he testified that he would not have accepted it. On these facts, which are clearly shown in the record and which beyond question of doubt was before the Supreme Court, and which it had a right to rely upon, the Supreme Court held that appellant was unavailable for the reason that he refused his original position as order clerk and thus made himself unavailable for work. He thus violated Section 1345-6-a-(5) and (d)-(2) of the General Code of Ohio in that he was not unable to obtain work in his usual trade or occupation and that he also failed and refused to accept an offer of work for which he was reasonably fitted. This provision, under the facts, clearly denied him the right to benefits and all seven of the judges of the Supreme Court agreed that for this reason he was not entitled to receive benefits.

The ultimate question in this case was whether, under the circumstances, claimant was entitled to benefits? That question was as much before the Supreme Court as it was

before the Board of Review. That is the ultimate question which was before the Board of Review, the Common Pleas Court, the Court of Appeals and the Supreme Court. The fact that appellant was allowed to have printed a very meagre abstract of the record by the Supreme Court does not eliminate the ultimate question in this case, which is—appellant's right to receive benefits. That is the only question before the court, the other matters which were discussed are only reasons why he should or should not receive benefits.

The record which has been furnished in this appeal by the appellant fails to establish that a jurisdictional question was reserved. However, the record does show that, among other things, the Supreme Court did decide this cause on a non-federal ground, independent of any federal question, based upon the record which was before the Supreme Court, which adequately supports such judgment.

Motion to Dismiss or Affirm

For the foregoing reasons and based upon upon the foregoing authorities these defendants-appellees move that the court dismiss the appeal of this appellant or affirm the judgment of the Supreme Court of Ohio, entered on the 1st day of May, 1946.

Respectfully submitted,

HUGH S. JENKINS,
Attorney General of Ohio,
E. G. SCHUESSLER,
Chief Counsel;
JOHN M. WOY,
Assistant Attorney General,
Attorneys for Defendants-Appellees.

Supreme Court of the United States

OCTOBER TERM, 1946

No. 338

MAX KUT,

Appellant,

v.

BUREAU OF UNEMPLOYMENT COMPENSATION OF THE STATE OF OHIO, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR REHEARING

Max Kut, appellant, respectfully petitions the Court to reconsider the Court's order entered October 14, 1946, granting appellee's motion to dismiss, and dismissing appellant's appeal on the ground that the decision of the Supreme Court of Ohio sought to be reviewed was based upon a non-federal ground adequate to support it, citing *Berea College* v. *Kentucky*, 211 U. S. 45.

When taking the appeal, we were cognizant of this decision and of the rule that, if the non-federal ground has fair support, this Court is not at liberty to inquire whether it is right or wrong, but must accept it as the Court does other state decisions on non-federal questions. But, with great respect, we venture to urge that if the Court will permit, we shall be able to show that the non-federal ground has

no fair support either in fact or in law; and that this case comes rather within *Lawrence* v. *State Tax Commission of Mississippi*, 286 U. S. 276, in which the Court said (p. 282):

> "Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided." (Citing cases.)

and (id. bot.):

> "We therefore conclude that the purported non-federal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory, and that the appellant may invoke the jurisdiction of this Court to decide the question."

In *Ward* v. *Love County*, 253 U. S. 17, 22, cited by this Court in the *Lawrence* case, *supra*, this Court said:

> "It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support."

The *Lawrence* case also cites *Enterprise Irrig. Dist.* v. *Canal Co.*, 243 U. S. 157, in which at p. 164 is said a review by this Court cannot be prevented

> "where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question."

Our "Statement As To Jurisdiction" (Pp. 2-3) cites the statute of Ohio in force at the time involved, but does not sufficiently emphasize the second paragraph of G. C. § 1345-6b, reading:

> "An individual who has been discharged for just cause in connection with his work or who has voluntarily quit his work without just cause in connection with his work and thereafter is unable to secure other employment, shall have a waiting period of three additional weeks during which no benefits shall be payable."

From this provision it is apparent that an individual does not impair his right to unemployment compensation under the Ohio Act, unless he

> "voluntarily quit his work without just cause. . . ."

The Ohio Supreme Court opinion does not mention at all or consider this provision, which is an integral part of the statute as much as any other section and vitally applicable to this case. The Ohio Supreme Court merely cites Section 1345-6a (4) (P. 51). It does mention that Kut was first an order clerk and subsequently became a so-called checker (Pp. 51-53). But it inexcusably omits to mention that to accept again the position of ~~checker~~ order clerk would be a demotion, both as respects type of position and pay.

It is true, as mentioned in the statement opposing jurisdiction (P. 6) that the Board of Review found Kut was offered and refused to take his former position (P. 38). This was never disputed. But neither the Board of Review nor any court found or could have found that Kut

> "voluntarily quit his work without just cause."

On the contrary, the undisputed evidence shows that he was given his release or quit his work for "just cause." The Board merely found his employment terminated March 7, 1944 (P. 24) and assumed he had quit his work with just cause. The Board disallowed his claim solely because of his refusal to work in new employments tendered requiring him, contrary to his former work, to work on Saturdays.

The Common Pleas Court in its judgment of reversal expressly found (P. 42):

> "3. That appellant voluntarily quit his work at Albers Super Markets, Inc., on March 7, 1944, for just cause and did not secure other employment until April 4, 1944."

On the undisputed facts, this finding is correct. As matter of law, Kut's leaving with the employer's consent and release rather than to accept a demotion as to type of work and compensation is "for just cause." In *Hoyer, Plaintiff* v. *United Dressed Beef Company, Inc.*, U. S. D. C., S. D. Cal., Central Div. (decided May 31, 1946, not yet reported in Federal Supplement but appearing in 3 CCH Labor Law Service, p. 69570, par. 63,271), a change by the employer in his method of compensation from a salary to a commission basis which a veteran refused to accept after re-employment was held to be a discharge "without cause." This decision appeared after the decision of the Ohio Supreme Court. But, even if it had not and we had known of it, we should not have cited it there because, until the decision of the Supreme Court, there was no intimation at any stage of the proceedings and we had no idea that the justification for Kut's leaving was to be an issue.

The Bureau took an appeal on law only, not on fact and law. This finding of just cause was never questioned either in the review by the Court of Appeals or in the Supreme Court. We assert that when a Supreme Court after deciding adversely to appellant the constitutional question, which alone was raised or argued, drags in additionally a non-federal ground, not raised or argued and unsupported by the facts, findings or appellate procedure, decision of the non-federal question being without reference to that portion of the statute which would necessarily have made the decision the contrary, this is only for the

obvious purpose of preventing review by this Court of the important constitutional question made in the record and should not be permitted to succeed.

The question is indeed important and should be resolved sometime by this Court. We ask the Court, in view of the speciousness and unsupported nature of the non-federal ground decision and the great burden of again going through five tribunals in another case involving the constitutional question before reaching this Court, that even if the Court is not completely convinced, at least that it grant the slight time required for argument if probable jurisdiction should be noted.

We respectfully submit, in more detail, that the decision of the Supreme Court of Ohio does not rest upon a permissible or tenable non-federal ground:

1. The original disallowance of appellant's application for benefits was made by the Administrator *solely* on the ground that the claimant was not available for work on a Saturday (P. 5). It was never contended by the Administrator that appellant had not quit his employment for just cause. This is clearly established by the "Notice of Ineligibility" (P. 5) which stated:

> "Facts available establish that the claimant is not available for work on a Saturday. He is therefore not available for work within the meaning of Section 1345-6-a-(4), General Code and Paragraph 412 of the Rules and Regulations."

2. In the administrative hearing before the referee appointed by the Bureau of Unemployment Compensation, the reason for denying benefits *related solely to availability after release.* The referee took the position that because claimant was not available for work on his religious Sabbath, he was not entitled to benefits under the Act (P. 6). It was not even suggested in the opinion of the referee that appellant had not quit his employment for just cause.

3. The majority decision of the Board of Review of the Ohio Bureau of Unemployment Compensation affirmed the decision of the referee *solely on the ground that the claimant was not available for work on his Sabbath* (Pp. 7, 23). Here, again, there was no suggestion that claimant was not entitled to compensation because of the circumstances upon which his employment with Albers Super Markets, Inc. was terminated.

4. On the appeal from the Board of Review to the Court of Common Pleas for Hamilton County, Ohio, that Court, in its opinion, found that "Rather than *demote* the appellant, the employer *gave him a release.* His employment was thus terminated" (Pp. 9, 37). This certainly is not saying and is the opposite of saying that he

"quit his work without just cause. . . ."

5. The judgment entry of the Common Pleas Court specifically included in its finding the fact that appellant had quit his work *"for just cause"* (Pp. 9, 41).

6. The Attorney General of Ohio, in connection with his appeal to the Court of Appeals for the First Appellate District, did not assign as error (Printed Record O. S. Ct. p. 2) the finding in the opinion and judgment of the Common Pleas Court that appellant's employer gave him his release and that he quit work "for just cause," nor was there any assignment of error that the finding of the Common Pleas Court was not sustained by the evidence or was against the weight of the evidence (P. 10). The appeal was "on questions of law" (R. O. S. Ct., p. 1).

7. The syllabus of the opinion of the Court of Appeals, in which all of the judges concurred, shows that the denial of compensation to appellant was upheld *solely on the ground that appellant refused employment requiring work on Saturday* (P. 42). The opinion of the Court of Appeals

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(P. 43) shows that the wages of a "checker" were higher than those of an "order clerk" and adds:

> "Since the only work that Albers Super Markets, Inc., had to offer was to *return him back* as order clerk, at which he had started, the employer assumed that this would not be satisfactory to Kut and gave him his release, thus terminating his employment on March 7, 1944."

This, too, is the opposite of a statement either that Kut quit or "quit without just cause."

8. In the judgment entry of reversal of the Court of Appeals, the sole basis of the decision against appellant was that because he would not work on his religious Sabbath, he was thereby rendered ineligible for unemployment compensation benefits and that this did not infringe on any of his constitutional rights. There was no suggestion in either the opinion or judgment entry of the Court of Appeals that the reason why appellant was held not entitled to benefits was because he voluntarily left his employment with Albers Super Markets, Inc. without just cause (Pp. 42-49). By G. C. Sec. 12223-21, the finding of the Common Pleas Court that he quit for just cause, was thus affirmed.

9. After appellant appealed to the Supreme Court of Ohio as of right upon the claimed constitutional question involved, and the motion to dismiss the appeal for want of a substantial constitutional question was overruled, the Attorney General took no cross appeal to review the findings of the lower courts that appellant had been given his release by his employer and that he quit "for just cause" (P. 12).

10. In the brief of the Attorney General on his motion to dismiss appellant's appeal as of right to the Supreme Court of Ohio, the Attorney General did not question the findings of the lower courts that appellant had quit for

just cause. On the contrary, the Attorney General confirmed in his brief that *"The sole question then is whether he had a right to refuse the offer of work on the ground that he would not work on Saturdays because of his religion"* (P. 13).

11. Following briefs and oral argument, the Supreme Court of Ohio overruled the motion of the Attorney General to dismiss the appeal as of right, thereby recognizing that there was a serious constitutional question involved in the proceeding. Indeed, the entry of the Supreme Court of Ohio specifically found that "there were reasonable grounds for this appeal" (P. 17). The opinion of the Ohio Supreme Court apparently forgets that the case was before it as of right because of a constitutional question and mentions only (P. 51 top) that the case was there

> "upon the allowance of the plaintiff's motion to certify the record."

12. By stipulation of counsel for the parties, filed in the Supreme Court of Ohio, it was "agreed that the opinion and judgment of the Common Pleas Court and the opinion and judgment of the Court of Appeals *correctly and sufficiently present the facts necessary to be considered by the Court"* (P. 54). As already shown, these opinions and judgments clearly established that the employer had given appellant his release and that he had quit his work for just cause. In view of this stipulation, *there was nothing in the record before the Supreme Court of Ohio on which that Court could have found and it did not find that appellant voluntarily left his employment without just cause.*

13. By the provisions of Ohio General Code, Section 12223-31, the Supreme Court of Ohio does not review the findings of a lower court. It only inquires whether there was any evidence to support such findings; if there was any evidence to support them, the finding stands. See *State,*

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ex rel. Kobelt, Appellee v. *Baker, et al., Trustees of Police Relief Fund of City of Parma, et al., Appellants,* 137 O. S. 337 (1940), wherein the court announced the rule as follows:

> "This court has held repeatedly that it will not weigh the evidence but will examine the record to ascertain whether there is any evidence in support of the contention of the prevailing party."

See, also, *Keesecker* v. *The G. M. McKelvey Co.,* 141 O. S. 162, 169, second par. syl.

This is much like the rule that prevails in review by a Federal Court of Appeals of the judgment of the District Court in an action at law. Certain it is that there was evidence here, and indeed unquestioned, uncontradicted and conclusive evidence, that appellant left his employment for just cause.

14. A non-federal ground can be claimed on nothing more substantial than a statement in the decision of the Ohio Supreme Court that appellant refused to accept a demotion, implying therefrom that such termination of employment was voluntary (P. 51), but not that it was without just cause. Such a statement the Supreme Court of Ohio had no reason or power to make. Without a finding that Kut quit without just cause, it means nothing and furnishes no ground for denying him compensation. Such a decision is insufficient, arbitrary, contrary to all the findings throughout the administrative proceedings and lower Ohio courts and *contrary to the specific stipulation entered into with the Court's permission by counsel with respect to the record, never questioned or repudiated.*

We submit that the non-federal ground set forth in the decision of the Supreme Court of Ohio is insufficient as matter of law to avoid Kut's claim, has no support in the record and is directly contrary to the undisputed facts in the record. We urge, therefore, that on reconsideration

of this appeal, probable jurisdiction be noted and appellee's motion to dismiss be overruled.

Respectfully submitted,

MURRAY SEASONGOOD,
LESTER A. JAFFE,
Counsel for Appellant.

PAXTON & SEASONGOOD,
Of Counsel.

We, Murray Seasongood and Lester A. Jaffe, of counsel for appellant, certify that the foregoing petition for rehearing is, in our opinion, well founded, that it is filed in good faith and not interposed for delay.

MURRAY SEASONGOOD,
LESTER A. JAFFE.

No. 338. KUT *v.* BUREAU OF UNEMPLOYMENT COMPENSATION ET AL. Appeal from the Supreme Court of Ohio. October 14, 1946. *Per Curiam:* The motion to dismiss is granted, and the appeal is dismissed for the reason that the decision of the state court sought here to be reviewed was based upon a non-federal ground adequate to support it. *Berea College* v. *Kentucky*, 211 U. S. 45. *Murray Seasongood* and *Lester A. Jaffe* for appellant. *E. G. Schuessler* for appellees. Reported below: 146 Ohio St. 522, 66 N. E. 2d 643.